

RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO

CARLSBAD MUNICIPAL WATER DISTRICT  
c/o City of Carlsbad  
1200 Carlsbad Village Drive  
Carlsbad, CA 92008  
Attn: City Attorney

Exempt from recording fees pursuant to  
California Government Code Section 27383

## **WATER PURCHASE AGREEMENT**

**Entered Into**

**By and Between**

**The Carlsbad Municipal Water District,**

**And**

**Poseidon Resources (Channelside) LLC**

**September 28, 2004**

1787

## TABLE OF CONTENTS

RECITALS. ....	1
OPERATIVE PROVISIONS.....	2
1. PURCHASE AND SALE OF CONTRACT CAPACITY. ....	2
1.1 Contract Capacity. ....	2
1.2 District's Daily Requirements .....	2
2. TERM. ....	3
2.1 Extension Terms. ....	3
2.2 Water Year, Defined. ....	5
2.3 Termination Prior to the Commercial Operation Date .....	5
3. PURCHASE PRICE. ....	6
3.1 Purchase Price.....	6
3.2 Adjustments to the Base Price. ....	7
3.3 Time and Manner for Payments.....	7
3.4 Take-if-Delivered Contract .....	8
3.5 Additional Amounts.....	8
4. CONSTRUCTION.....	8
4.1 Engineering, Procurement and Construction. ....	8
4.2 Testing. ....	9
5. LEGAL ENTITLEMENTS. ....	9
6. PROJECT OPERATION AND MAINTENANCE. ....	9
6.1 Continuous Operation. ....	9
6.2 Operations, Maintenance, Management and Repair. ....	9
6.3 Operation and Maintenance Manual.....	10
7. DAMAGE TO THE PROJECT, DISTRIBUTION SYSTEM TECHNICAL STUDIES .....	10
7.1 Damage to the Project.....	10
7.2 Distribution System Technical Studies.....	10
8. WATER QUALITY.....	13
8.1 Water Quality Issues.....	13
8.2 Quality Standards, Compliance with Law, Pressure Parameters and Water Quality Standards. ....	13
8.3 Finalization of Water Quality Specification for Boron .....	14

783

8.4 District's Non-Acceptance.....	14
8.5 Compliance with Regulations on Water Quality .....	14
9. DELIVERY OF WATER.....	14
9.1 Delivery of Water.....	14
9.2 Delivery Points.....	15
9.3 Delivery Schedule.....	15
9.4 Conveyance Losses.....	15
9.5 Meters and Records.....	16
9.6 Reports.....	16
9.7 Liquidated Damages for Failure to Deliver .....	16
9.8 District Failure to Accept Product Water .....	17
10. PRIORITY FOR PROJECT WATER, PRICE REDUCTION.....	17
10.1 Priority .....	17
10.2 Price Reduction.....	17
11. USE OF MAERKLE RESERVOIR.....	18
11.1 Maerkle Lease.....	18
11.2 Appurtenant Facilities.....	18
11.3 District's Obligation.....	18
11.4 Principles for Joint Use.....	18
12. INSURANCE.....	18
12.1 Form.....	19
12.2 District's Right to Procure.....	19
12.3 Deductibles, Excess Claims.....	19
12.4 Additional Insureds.....	19
12.5 Waiver of Subrogation.....	20
12.6 Statement of Insurance.....	20
12.7 Primary Insurance for Additional Insureds.....	20
13. CONDITIONS, ADDITIONAL ASSISTANCE.....	20
13.1 Poseidon's Conditions.....	20
13.2 District's Conditions.....	21
13.3 Additional Assistance .....	22
14. DEFAULTS AND REMEDIES.....	22

284

14.1 Default by Poseidon.....	22
14.2 District's Remedies.....	23
14.3 Default by District.....	24
14.4 Poseidon's Remedies.....	25
14.5 Damages Recoverable.....	25
15. REPRESENTATIONS AND WARRANTIES OF THE DISTRICT.....	25
15.1 Organization.....	25
15.2 Authorization.....	25
15.3 Enforceability.....	25
15.4 Governmental Consents.....	25
15.5 No Litigation.....	25
15.6 No Conflict.....	25
16. REPRESENTATIONS AND WARRANTIES OF POSEIDON.....	26
16.1 Organization.....	26
16.2 Authorization.....	26
16.3 Enforceability.....	26
16.4 Governmental Consents.....	26
16.5 No Litigation.....	26
16.6 No Conflict.....	26
17 FORCE MAJEURE.....	26
17.1 Defined.....	26
17.2 Force Majeure Examples.....	26
17.3 Events Not Deemed Force Majeure.....	27
17.4 Excused Performance.....	27
18. RIGHT OF FIRST OFFER.....	27
18.1 Restriction on Transfer.....	27
18.2 Right of First Offer.....	28
19. DISPUTE RESOLUTION.....	28
20. INDEMNITY.....	29
20.1 District's Indemnity.....	29
20.2 Poseidon's Indemnity.....	29
20.3 Indemnification Procedures.....	29

285

21. MISCELLANEOUS.....	30
21.1 Further Actions.....	30
21.2 Amendment.....	30
21.3 Entire Agreement.....	31
21.4 Notices.....	31
21.5 Controlling Law.....	32
21.6 Headings.....	32
21.7 Cumulative Rights; Waiver.....	32
21.8 Liberal Construction.....	32
21.9 Severability.....	32
21.10 Good Faith and Fair Dealing.....	32
21.11 No Third Party Beneficiaries.....	32
21.12 Execution in Counterparts; Facsimile Signatures.....	33
21.13 Time of the Essence.....	33
21.14 Authority.....	33
21.15 Number, Gender.....	33
21.16 Assignment.....	33
21.17 Relationship.....	34
21.18 Agreement Not a Discretionary Approval.....	34
21.19 Financing the Project.....	35
21.20 Project and Site Devoted to Public Use.....	35
21.21 Recordation of Agreement.....	35
21.22 Security.....	35

**Schedules and Exhibits Attached**

Schedule 3	Purchase Price
Schedule 8.2	Quality Standards
Schedule 12	Insurance
Exhibit 13.2.9	Development Agreement Term Sheet

286

## TABLE OF DEFINED TERMS

	<u>Section</u>
<u>Acceptance Deadline</u> .....	18.2.2
<u>Accepted Offer</u> .....	18.2.2
<u>Additional Amounts</u> .....	3.5
<u>Additional Insurance</u> .....	12
<u>Additional Payment</u> .....	Schedule 3 (4)
<u>Agreement</u> .....	Preamble
<u>Applicable Laws</u> .....	4.1
<u>Approval Date</u> .....	21.18
<u>Appurtenant Facilities</u> .....	9.2
<u>Appurtenant Facilities Agreement</u> .....	9.2
<u>Authority</u> .....	Schedule 3 (2) (b)
<u>Avoided Water Cost</u> .....	Schedule 3 (2) (a)
<u>Base Price</u> .....	3.1.1
<u>Boron Expert</u> .....	8.1
<u>CEQA</u> .....	Recital E
<u>Change In Law</u> .....	3.2.2
<u>City</u> .....	Recital B
<u>Commercial Operation</u> .....	4.2
<u>Commercial Operation Date</u> .....	4.2
<u>Committee</u> .....	19
<u>Construction Permit Deadline</u> .....	2.3.4
<u>Consumer Plumbing Test</u> .....	7.2.2
<u>Consumer Quality Standards</u> .....	8.5
<u>Consumer Test Components</u> .....	7.2.2
<u>Contract Capacity</u> .....	Recital C
<u>Corrosion Advisory Panel</u> .....	7.2.4
<u>CPI</u> .....	Schedule 3 (1) (a)
<u>Days</u> .....	21.13
<u>Deferred Payment</u> .....	Schedule 3 (3) (b)
<u>Delivery Charge</u> .....	3.2.3
<u>Delivery Point</u> .....	9.2
<u>Delivery Regime</u> .....	9.3
<u>Determination Date</u> .....	2.3.1
<u>Development Agreement</u> .....	13.2.9
<u>Distribution System</u> .....	7.2.1
<u>District</u> .....	Preamble
<u>District Event of Default</u> .....	14.3
<u>District Indemnities</u> .....	20.2
<u>Effective Date</u> .....	Preamble
<u>Existing Term</u> .....	2.1.4 (c)
<u>Extended Period</u> .....	9.7
<u>Extended Shortfall</u> .....	14.1.2

207

<u>Extension Option</u> .....	2.1.1
<u>Extension Term</u> .....	2.1.1
<u>Force Majeure</u> .....	17.1
<u>Governmental Authority</u> .....	5
<u>Initial Period</u> .....	9.7
<u>Interconnection Points</u> .....	9.2
<u>Independent Representative</u> .....	19
<u>Lead Agency</u> .....	5
<u>Legal Entitlements</u> .....	5
<u>LOC</u> .....	21.22
<u>Losses</u> .....	20.1
<u>Maerkle Lease</u> .....	11.1
<u>MGD</u> .....	Recital A
<u>MWD</u> .....	3.1.2
<u>New City Charges</u> .....	3.5.1
<u>O&amp;M Manual</u> .....	6.3
<u>Offer</u> .....	18.2.2
<u>Option Exercise Notice</u> .....	2.1.4(c)
<u>Other Avoided Charges</u> .....	Schedule 3 (2) (c)
<u>Other Grants or Subsidies</u> .....	3.1.2
<u>Overdue Notice</u> .....	3.3
<u>Overdue Rate</u> .....	3.3
<u>Parties</u> .....	Preamble
<u>Party</u> .....	Preamble
<u>Performance Test</u> .....	4.2
<u>Poseidon</u> .....	Preamble
<u>Poseidon Event of Default</u> .....	14.1
<u>Poseidon Indemnities</u> .....	20.1
<u>Product Water</u> .....	Recital A
<u>Product Water Causation Event</u> .....	8.5
<u>Project</u> .....	Recital A
<u>Projected Commencement Date</u> .....	12
<u>Property Interest</u> .....	18.1
<u>Prudent Industry Practices</u> .....	4.1
<u>Purchase Option</u> .....	2.1.5(a)
<u>Purchase Option Exercise Notice</u> .....	2.1.5(c)
<u>Purchase Option Price</u> .....	2.1.5(d)
<u>Purchase Option Term</u> .....	2.1.5(b)
<u>Purchase Price</u> .....	3.1.1
<u>Quality Standards</u> .....	8.2
<u>Rate Structure Change</u> .....	Schedule 3 (2) (d)
<u>RDA</u> .....	5
<u>Request</u> .....	18.2.1
<u>SDCWA Price</u> .....	Schedule 3 (2) (b)
<u>Security</u> .....	21.22

288

<u>Separate Counsel</u> .....	20.3
<u>Shortfall</u> .....	10.1
<u>Site</u> .....	Recital B
<u>Step-In Right</u> .....	14.2.3
<u>Subsidy</u> .....	3.1.2
<u>Supplemental Agreements</u> .....	1.2
<u>Supplemental Capacity</u> .....	1.2
<u>System Monitoring Plan</u> .....	7.2.3
<u>System Test</u> .....	7.2.1
<u>System Test Components</u> .....	7.2.1
<u>Term</u> .....	2
<u>Threshold</u> .....	9.7
<u>Tracking Account</u> .....	Schedule 3 (3) (a)
<u>Transfer</u> .....	18.1
<u>Undelivered Water</u> .....	9.8
<u>Water Quality Issues</u> .....	8.1
<u>Water Year</u> .....	2.2
<u>Year Period</u> .....	14.1.1

289



## WATER PURCHASE AGREEMENT

This Water Purchase Agreement ("Agreement"), entered into as of this 28th day of September, 2004 (the "Effective Date"), is made by and between the Carlsbad Municipal Water District, a municipal water district (the "District"), and Poseidon Resources (Channelside) LLC, a Delaware limited liability company ("Poseidon") (the District and Poseidon sometimes hereinafter are referred to collectively as the "Parties" and individually as a "Party"), with respect to the following facts:

### R E C I T A L S

A. Based on technical, financial, environmental and engineering studies it has conducted since 1998, Poseidon has determined it is feasible to develop a reverse osmosis seawater desalination plant (the "Project") capable of delivering up to fifty (50) million gallons per day ("MGD") or 56,000 acre-feet annually, but not less than twenty-five (25) MGD or 28,000 acre-feet annually, of desalinated water ("Product Water") meeting specified water quality standards.

B. The Project will be located at a site (the "Site") owned by Cabrillo Power I LLC in the City of Carlsbad (the "City") and leased to Poseidon. The District provides domestic water service to the City.

C. Poseidon desires to sell to the District, and the District desires to buy from Poseidon, at wholesale, up to twenty-five (25) MGD of Product Water (as adjusted pursuant to this Agreement, the "Contract Capacity"), pursuant to an arrangement where the appropriate risks of development, construction and operation of the Project are borne by Poseidon and neither the District nor the City has any liability with respect to the financing of the Project.

D. Through the series of contractual rights and obligations contained in this Agreement (including but not limited to the District's right to purchase Product Water from Poseidon, the District's right of first offer described in Section 18 of this Agreement, and the District's right to exercise the options described in Sections 2 and 14.2.2 of this Agreement) the Parties intend to devote the Project and Poseidon's interest in the Site to public use by the District and the City to the extent of the Contract Capacity so that the Project and Site will be "appropriated to public use" pursuant to Cal. Code of Civil Procedure § 1240.660.

E. Before the District can commit to purchase any Product Water, the District must first comply with the California Environmental Quality Act ("CEQA"), compliance with which is a condition precedent to the District's obligation to purchase Product Water as set forth below. As part of the City's environmental analysis under CEQA, an Environmental Impact Report is required to analyze the proposed Project including the contractual agreements with the District that would be included in the Project for the purchase of Product Water from the Project. This Agreement prior to the Approval Date (as defined herein), shall not constitute a "project" subject to CEQA, and nothing in this Agreement prior to the Approval Date shall be construed under Public Resources Code Section 21065 as (a) an activity undertaken by the District or any other public agency, (b) the support of any activity undertaken by a person (including without

limitation Poseidon) which is supported in whole or in part by any contract, grant, subsidy, loan or other form of assistance from any public agency, or (c) any issuance to a person (including without limitation Poseidon) of any lease, permit, license, certificate, or other entitlement for use by any public agency.

F. Subject to the terms and conditions set forth below, Poseidon now desires to contract with the District, and the District now desires to contract with Poseidon, for the purchase of Product Water from the Project.

NOW, THEREFORE, in consideration of the foregoing recitals, the mutual covenants and conditions contained herein, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

## **OPERATIVE PROVISIONS**

### **1. PURCHASE AND SALE OF CONTRACT CAPACITY.**

**1.1 Contract Capacity.** Subject to all of the terms and conditions of this Agreement, the District hereby agrees to buy the Contract Capacity from Poseidon, and Poseidon hereby agrees to sell the Contract Capacity to the District, to be delivered in installments pursuant to the Delivery Regime to be developed by the Parties pursuant to Section 9.

**1.2 District's Daily Requirements.** Poseidon acknowledges that, by entering into this Agreement, the District intends to purchase from the Project all of its daily requirements for water (up to the Contract Capacity) and that the District currently has variable daily requirements ranging from ten (10) MGD to twenty-five (25) MGD. Accordingly, in light of the District's variable requirements, the Parties acknowledge and agree that Poseidon shall use commercially reasonable efforts to enter into mutually acceptable supplemental agreements with third parties (the "Supplemental Agreements") for up to fifteen (15) MGD of the Contract Capacity. Pursuant to such Supplemental Agreements, Poseidon may sell up to fifteen (15) MGD of the Contract Capacity otherwise reserved for the District under this Agreement (the "Supplemental Capacity") to third parties during periods when the District requires less than twenty-five (25) MGD of Contract Capacity from the Project, and such Supplemental Capacity shall otherwise be available to the extent necessary to satisfy the District's requirements during days the District requires more than ten (10) MGD of water. Poseidon agrees that: (a) in no event shall Poseidon enter into Supplemental Agreements pursuant to which it agrees to sell more than fifteen (15) MGD out of the Contract Capacity; and (b) on the terms and conditions set forth in this Agreement, Poseidon shall at all times supply the District with Product Water sufficient to meet its daily requirements up to the Contract Capacity. Poseidon further agrees that during the Term the Project shall have the capacity to deliver at least twenty-five (25) MGD of Product Water, and without the District's prior written consent, Poseidon shall not enter into any oral or written agreement, contract, instrument, undertaking or any other kind of understanding whatsoever, which, individually or in the aggregate, shall preclude the District from purchasing the Contract Capacity. The District shall have the right to review the regimes

for the delivery of Product Water to third parties to confirm that such regimes do not adversely affect the District's rights under this Agreement.

**2. TERM.** The term ("Term") of this Agreement shall commence on the Effective Date and shall continue for a period of thirty years (30) after the Commercial Operation Date (defined in Section 4.2 below), unless extended or sooner terminated in accordance with the provisions of this Agreement. The District's obligation to purchase Product Water shall commence if and when the Approval Date (as defined in Section 21.18) shall have occurred, and the conditions set forth in Section 13.2 have been satisfied or waived by the District.

## **2.1 Extension Terms.**

**2.1.1 Extension Option.** The District may, at the District's option (the "Extension Option"), elect to extend the Term of this Agreement for two (2) consecutive additional periods of thirty (30) years each (severally called "Extension Term"), subject to all the provisions of this Agreement, provided that the Purchase Price for each Extension Term shall be adjusted as provided in Section 2.1.4(c). Subject to the exercise of an Extension Option becoming effective pursuant to Section 2.1.4(c), an Extension Term shall commence at the expiration of the Term (or the first Extension Term as the case may be) and shall terminate on the thirtieth (30th) anniversary of the date of commencement of that Extension Term, unless sooner terminated as provided herein.

**2.1.2 Failure to Exercise.** If the District fails to exercise the Extension Option for an Extension Term within the time provided in Section 2.1.4(c), then the Extension Option herein granted for such Extension Term shall lapse and be of no further force or effect. Failure to exercise the Extension Option for the first Extension Term shall nullify the Extension Option for the second Extension Term.

**2.1.3 References to "Term."** After the exercise of any Extension Option, all references in this Agreement to the "Term" shall be considered to mean the Term as extended, and all references to termination or to the end of the Term shall be considered to mean the termination or end of the first or second Extension Term, as the case may be.

**2.1.4 Conditions to Exercise.** The District's right to the Extension Option are subject to the following conditions:

(a) **Agreement in Effect.** This Agreement shall be in effect at the time notice of exercise is given and on the last day of the Term (or the first Extension Term, as the case may be).

(b) **No Default.** No District Event of Default shall have occurred and be continuing at the time notice of exercise is given.

(c) **Procedure.** The District may notify Poseidon of its desire to exercise the Extension Option for each Extension Term only by delivering Poseidon written notice of such extension request (each such notice, an "Option Exercise Notice"). The District

shall deliver the Option Exercise Notice at least forty-eight (48) months prior to the expiration of the then-current term of the Agreement (the "Existing Term"). Promptly after delivery of the Option Exercise Notice, the Parties shall commence negotiations in good faith on equitable adjustments to the Purchase Price. If the Parties reach agreement on such adjustments no later than twenty-four (24) months prior to the expiration of the Existing Term, the exercise of the Extension Option shall be deemed effective. If the Parties do not reach agreement on such adjustments by twenty-four (24) months prior to the expiration of the Existing Term, the exercise of the Extension Option shall be deemed ineffective and the Agreement will terminate on the last day of the Existing Term (unless otherwise agreed by the Parties).

#### **2.1.5 District Purchase Option**

(a) In the event that the District's exercise of the Extension Option is deemed ineffective pursuant to Section 2.1.4(c), the Parties hereby agree that the District shall have an option (the "Purchase Option") but not the obligation to purchase the Project in accordance with the terms and conditions set forth herein.

(b) **Option Term.** The term of the Purchase Option (the "Purchase Option Term") shall commence on the date that the District's exercise of the Extension Option is deemed ineffective and shall expire twelve (12) months prior to the last day of the Existing Term.

(c) **Exercise of Purchase Option.** The District shall exercise the Purchase Option by delivering to Poseidon written notice (the "Purchase Option Exercise Notice") prior to the expiration of the Purchase Option Term of the District's election to exercise the Purchase Option. Unless and until the District shall deliver the Purchase Option Exercise Notice, the District shall have no obligation to purchase the Project from Poseidon.

(d) **Purchase Option Price.** The purchase price (the "Purchase Option Price") shall be the fair market value of the Project as determined pursuant to this Section 2.1.5(d). The Parties shall have ninety (90) days after Poseidon receives the Purchase Option Exercise Notice in which to agree on the Purchase Option Price. If the Parties are unable to agree on the Purchase Option Price within that period, then within ten (10) days after the expiration of that period each of the District and Poseidon, at its respective cost and by giving notice to the other Party, shall appoint a qualified appraiser to set the Purchase Option Price for the Project. If either Poseidon or the District fails to appoint an appraiser within ten (10) days after the other Party has given notice of the name of its appraiser, the single appraiser appointed shall be the sole appraiser and shall set the Purchase Option Price of the Project. If the two appraisers are appointed by the Parties as set forth in this Section 2.1.5(d), they shall meet promptly and attempt to set the Purchase Option Price of the Project. If they are unable to agree on the Purchase Option Price within thirty (30) days after the second appraiser has been appointed, they shall attempt to select a third qualified appraiser within ten (10) days after the last day the two appraisers are given to set the Purchase Option Price. If they are unable to agree on a third appraiser, either of the District or Poseidon, upon ten (10) days notice to the other Party, may apply to the presiding judge of the Superior Court of the State of California, County of San Diego, for the selection of a third, qualified appraiser. The District and Poseidon each

293

shall bear one-half of the cost of appointing the third appraiser and of paying the third appraiser's fee. The third appraiser, however selected, shall be a person who has not previously acted in any capacity for either of the District or Poseidon.

Within thirty (30) days after the selection of the third appraiser, a majority of the appraisers shall set the Purchase Option Price of the Project. If a majority of the appraisers are unable to set the Purchase Option Price within the required time period, the three appraisals shall be added together and their total divided by three (3); the resulting quotient shall be the Purchase Option Price of the Project. Notwithstanding the foregoing, the low appraisal shall be disregarded if it is more than ten percent (10%) lower than the middle appraisal, and the high appraisal shall be disregarded if it is more than ten percent (10%) higher than the middle appraisal. If only one appraisal is disregarded, then the remaining two (2) appraisals shall be added together and their total divided by two (2); the resulting quotient shall be the Purchase Option Price of the Project. If both the low appraisal and the high appraisal are disregarded, the middle appraisal shall be the Purchase Option Price for the Project.

After the Purchase Option Price has been set, the appraisers immediately shall notify the Parties. If the District objects to the Purchase Option Price that has been set, the District shall have the right to elect not to purchase the Project, so long as the District pays all the costs in connection with the appraisal procedure that set the Purchase Option Price. The District's election not to purchase the Project must be exercised within ten (10) days after receipt of notice from the appraisers of the Purchase Option Price. If the District does not exercise its election within such ten (10) day period, the District shall purchase the Project from Poseidon as set forth in this Section 2.1.5(d).

(e) **Closing.** The closing date of the purchase of the Project pursuant to the Purchase Option shall be the last day of the Term. The District shall deliver the Purchase Option Price at the closing and at or prior to the closing the Parties shall execute and deliver such other documents as are reasonably necessary to consummate the transfer of the Project.

**2.2 Water Year, Defined.** As used in this Agreement, "Water Year" means a period of twelve (12) consecutive calendar months, commencing on the first day of January and ending on the last day of December; provided, however that the first Water Year shall commence on the Commercial Operation Date and shall end on December 31, and the last Water Year shall commence on January 1 prior to the date the Term of the Agreement expires or is terminated, whichever applies, and shall end on the last day of the Term of this Agreement or the effective date of any termination, whichever applies.

### **2.3 Termination Prior to the Commercial Operation Date.**

**2.3.1 Certain Events.** In the event that by a date that is twenty-four (24) months after the Effective Date (as such date may be extended by mutual agreement of the Parties) (the "Determination Date") any of the following has not occurred, then either Party may terminate this Agreement provided it is not in breach of its obligations hereunder: (i) the Environmental Impact Report for the Project has not been certified under CEQA, (ii) Poseidon has not entered into the Supplemental Agreements in accordance with Section 1.2, (iii) the

Parties have not completed the development of the System Test pursuant to Section 7.2.1 and the Consumer Plumbing Test pursuant to Section 7.2.2, (iv) the Parties have not determined the concentration limits for Boron pursuant to Section 8.3, (v) the Parties have not determined the Interconnection Points pursuant to Section 9.2 (and, if applicable, entered into the Appurtenant Facilities Agreement), (vi) the Parties have not determined the Delivery Regime pursuant to Section 9.3 or (vii) Poseidon has not obtained any required consent of Cabrillo Power I LLC to the District's exercise of its rights under Section 14.2.2.

**2.3.2 Authority Water Rates.** In the event that by the Determination Date Poseidon has reasonably determined that the water rates charged by the Authority are not sufficient to implement the Project, then Poseidon may terminate this Agreement.

**2.3.3 Completion of System Test.** In the event that the System Test has not been successfully completed by a date that is twenty-four (24) months after the initial commencement of the System Test (as such date may be extended by mutual agreement of the Parties), then either Party may terminate this Agreement.

**2.3.4 Legal Entitlements For Construction.** As more specifically set forth in Section 5, Poseidon shall obtain and maintain all Legal Entitlements with respect to the Project. On or before the fourth (4th) anniversary of the Effective Date (the "Construction Permit Deadline") Poseidon shall obtain (or cause its applicable subcontractors to obtain) all Legal Entitlements required for the commencement of construction of the Project. In the event that Poseidon has not obtained such Legal Entitlements by the Construction Permit Deadline, the Parties shall meet to assess the effect of the delay on the implementation of the Project. The Parties shall use commercially reasonable efforts to agree upon an extension of the Construction Permit Deadline. If the Parties cannot agree on such an extension, then either Party may terminate this Agreement.

### **3. PURCHASE PRICE.**

#### **3.1 Purchase Price.**

**3.1.1 Initial Purchase Price.** As the purchase price ("Purchase Price") for the Contract Capacity, the District shall pay to Poseidon in accordance with Section 3.3 an amount equal to (A) an amount per acre foot equal to the lower of (i) the Avoided Water Cost (as defined in Schedule 3) and (ii) the Base Price (as defined below), multiplied by (B) the total number of acre feet actually delivered (or deemed to be delivered pursuant to Section 9.8) to the Delivery Points (defined in Section 9.2). Subject to Sections 3.2, 9.2 and 10, the initial base price (the "Base Price") shall be the sum of (i) Eight hundred and sixty-one Dollars (\$861) per acre foot and (ii) the Delivery Charge as determined pursuant to Section 3.2.3.

**3.1.2 Subsidies.** The Parties shall use commercially reasonable efforts to obtain either (i) a subsidy from the Metropolitan Water District of Southern California ("MWD") under its Seawater Desalination Program in an amount not less than Two Hundred Fifty Dollars (\$250.00) per acre foot for the District's purchase of Product Water under this Agreement or (ii) a form of third party financial support for the District's purchase of Product Water under this

295

Agreement which provides the District with the economic equivalent of not less than Two Hundred Fifty Dollars (\$250.00) per acre foot for the District's purchase of Product Water under this Agreement (such subsidy or financial support hereinafter referred to as the "Subsidy"). Poseidon shall cooperate with the District in obtaining the Subsidy. The Parties further agree that the Base Price shall be equitably adjusted to reflect any other subsidies, grants or external funding, including without limitation funds available under Proposition 50, that shall reduce Poseidon's capital and/or operating and maintenance costs of the Project (the "Other Grants or Subsidies"). The Parties shall cooperate with each other in applying for and in obtaining any Other Grants or Subsidies.

### **3.2 Adjustments to the Base Price.**

**3.2.1 Schedule 3.** The Base Price shall be adjusted as described on Schedule 3.

**3.2.2 Change in Law.** In the event of any change to or the adoption of any Applicable Law after the Effective Date (a "Change in Law") (other than a Change in Law which results in a New City Charge) which would materially and adversely affect the ability of Poseidon to perform any of its material obligations under this Agreement the Base Price shall be equitably adjusted to reflect the costs incurred by Poseidon to comply with such change to or adoption of an Applicable Law.

**3.2.3 Delivery Charge.** Within twelve (12) months after the Effective Date, the Parties shall use commercially reasonable efforts to agree upon a mutually-acceptable per acre foot charge (the "Delivery Charge"), which charge shall reflect the cost of construction, financing, operation and maintenance of the Appurtenant Facilities. The Delivery Charge (as it may be reduced pursuant to Section 9.2) shall be a part of the Base Price as described in Section 3.1.1.

**3.2.4 Payment in Lieu of Taxes.** In the event that, subsequent to a third party acquiring the Project, including Poseidon's leasehold of the Site, such third party is not obligated to pay property taxes with respect to the Project or a fee in lieu of property taxes pursuant to the Development Agreement, the Base Price will be reduced by an amount equal to the amount of taxes no longer payable.

**3.3 Time and Manner for Payments.** For each month during the Term that deliveries of Product Water are made pursuant to this Agreement (or deemed made pursuant to Section 9.8), Poseidon shall invoice the District for the then-current Purchase Price for Product Water delivered to the Delivery Points in the preceding month and for any Additional Amounts incurred in the preceding month. The invoice for the last month of each Water Year also shall include the amount of any Deferred Payment and/or Additional Payment due from the District pursuant to Schedule 3. Within thirty (30) days of receipt of an invoice from Poseidon, the District shall remit to Poseidon the amount invoiced. Invoices and payments shall be delivered to Poseidon at the address for notices to Poseidon set forth in Section 21.4 of this Agreement. If Poseidon has not received payment prior to the thirtieth (30th) day after the District's receipt of the corresponding invoice, Poseidon may send the District a notice (an "Overdue Notice") with respect to such invoice. Payments made more than fifteen (15) days after the date of the

District's receipt of an Overdue Notice from Poseidon will bear a late fee/interest charge of one percent (1%) per month (but not to exceed the maximum amount permitted by law) (the "Overdue Rate"), from the thirtieth (30<sup>th</sup>) day after the date of receipt of the invoice. In the event of a dispute over the amount invoiced by Poseidon, the District promptly shall notify Poseidon of any such dispute and will pay any non-disputed amounts. If the Parties are unable to resolve any such disputes, the disputes shall be resolved in accordance with the procedure set forth in Section 20. If any disputed amount is adjusted in Poseidon's favor, the District shall pay to Poseidon the amount of such adjustment, with interest thereon at the Overdue Rate from the date such disputed amount was due until the date of actual payment.

**3.4 Take-if-Delivered Contract.** The Parties acknowledge and agree that this Agreement is a "take-if-delivered" contract for the purchase of Product Water from Poseidon during each year of the Term. Payments made by the District shall be based upon the quantity of water actually delivered (or deemed to be delivered pursuant to Section 9.8) to the Delivery Points multiplied by the Purchase Price in effect at the time of delivery, calculated in accordance with Sections 3.1 through 3.2 hereof, unless the Parties otherwise agree in writing.

**3.5 Additional Amounts.** In addition to the payment of the Purchase Price, the District shall reimburse Poseidon for the following items (the "Additional Amounts"):

**3.5.1 New City Charges.** All franchise fees, taxes or other monetary charges levied in a discriminatory manner by the City, the District, the RDA or any agency of any of the foregoing on Poseidon or the Project (collectively, the "New City Charges") but only to the extent actually paid by Poseidon. The Parties intend that, if possible, Poseidon shall pass through any such New City Charge to the District which, in turn, shall pass through any such New City Charge to its ratepayers, and the District shall collect such New City Charge from its ratepayers and shall remit such New City Charge on Poseidon's behalf to the City, the District or the RDA, whichever applies.

**3.5.2 Additional Insurance.** The cost of the premiums for the Additional Insurance (as described in Section 12).

#### **4. CONSTRUCTION.**

**4.1 Engineering, Procurement and Construction.** Poseidon shall engineer, procure and construct the Project in accordance with: (a) any law, statute, ordinance, rule, code, standard, regulation, requirement, judgment, consent decree, consent order, consent agreement, permit action, determination or order applicable to any activities associated with the designing, building, testing, acceptance, permitting, operation, maintenance, management and ownership of any part of the Project (collectively "Applicable Laws") and any other obligations of the Parties under this Agreement; and (b) those methods, techniques and standards that, at the time a particular service is performed and in light of the circumstances then known or which reasonably should have been known, are generally accepted for use in the design, construction, operation, maintenance, management and ownership of facilities similar to the Project (collectively "Prudent Industry Practices"). Poseidon shall not commence construction of the portion of the



Project which is to provide Product Water to the District until the condition set forth in Section 13.2.6 has been satisfied or waived by the District.

**4.2 Testing.** Prior to the Project having commenced selling Product Water on a continuous basis as contemplated by the Delivery Regime ("Commercial Operation"), the Project shall have completed successfully a performance test (the "Performance Test") of delivery of Product Water of the quality and quantity provided in this Agreement. The criteria for the Performance Test shall be developed by Poseidon in accordance with Prudent Industry Practices and approved by the District within thirty (30) days after Poseidon has delivered the criteria to the District. The criteria for the Performance Test shall be included in Poseidon's engineering, procurement and construction contract for the Project. The District also shall have an opportunity to be present at, and review the results of, the Performance Test. Poseidon may repeat the Performance Test as often as necessary, provided that it gives the District at least three (3) days notice prior to each Performance Test. Once the Project has completed the Performance Test successfully, Poseidon may declare that the Project is ready to enter into Commercial Operation and begin delivery of Product Water to the Delivery Points in accordance with Section 9 (the date of Poseidon's declaration is referred to herein as the "Commercial Operation Date").

**5. LEGAL ENTITLEMENTS.** Poseidon, at its sole cost and expense, shall be solely responsible for obtaining and maintaining (or causing its applicable subcontractors to obtain and maintain) any and all permits, licenses, approvals, authorizations, consents and entitlements of whatever kind and however described (collectively, "Legal Entitlements") which are required to be obtained or maintained with respect to the Project or the activities to be performed by Poseidon (or its applicable subcontractors) under this Agreement and which are required to be issued by any federal, state, city or regional legislative, executive, judicial or other governmental board, agency, authority, commission, administration, court or other body or any official thereof having jurisdiction with respect to any matter which is subject to this Agreement, including without limitation the California Coastal Commission, the Regional Water Quality Control Board, the City, the Carlsbad Housing and Redevelopment Commission ("RDA") and the District (each, a "Governmental Authority"). Poseidon also shall be solely responsible for compliance with and for all costs and expenses necessary for compliance with CEQA, to enable Poseidon to make Product Water available to the District pursuant to this Agreement, and Poseidon shall be responsible for initiating any procedures required for compliance with CEQA with regard to this Agreement. The City shall be the "lead agency" (as that term is used in CEQA) with respect to the Project and shall include this Agreement as part of the proposed Project which will be subject to environmental review under CEQA.

## **6. PROJECT OPERATION AND MAINTENANCE.**

**6.1 Continuous Operation.** Poseidon shall operate the Project at the level necessary to satisfy Poseidon's obligation to provide the Contract Capacity to the District under this Agreement in accordance with the Delivery Regime.

**6.2 Operations, Maintenance, Management and Repair.** Poseidon, at its sole cost and expense, shall operate, maintain and manage or cause its subcontractors (including plant

298

managers and operators) to operate, maintain and manage the Project in accordance with this Agreement, all Applicable Laws and Prudent Industry Practice. Without limiting the generality of the foregoing, Poseidon shall maintain the Project, including without limitation each material portion thereof, in good mechanical and operating repair and condition, perform maintenance in accordance with all Applicable Laws (whether now in force or hereafter adopted), Prudent Industry Practice and manufacturers' recommendations, ordinary wear and tear excepted. Poseidon shall repair or cause to be repaired the Project, including without limitation each material portion thereof, for damage caused by: (a) acts or omissions over which the District has no control; (b) acts or omissions of Poseidon or its officers, directors, shareholders, principals, agents, servants, employees, or third parties; or (c) Poseidon's failure to perform its obligations under this Agreement or its obligations under any other agreement in any way related to the ownership, use or operation of the Project.

**6.3 Operation and Maintenance Manual.** Poseidon shall prepare and amend periodically, in accordance with Prudent Industry Practices, an operation and maintenance manual (the "O&M Manual") which sets forth the installation, operation, maintenance, record keeping and reporting requirements for each material component of the Project and applicable licensing and qualification requirements for Project personnel. Prior to the Commercial Operation Date, Poseidon shall deliver to the District five (5) complete copies of the O&M Manual and associated equipment catalogs and manuals. Within five (5) days of adopting any amendments to the O&M Manual, Poseidon also shall deliver to the District five (5) copies of the O&M Manual, as amended.

## **7. DAMAGE TO THE PROJECT, DISTRIBUTION SYSTEM TECHNICAL STUDIES.**

**7.1 Damage To the Project.** If during the Term the Project or any material portion thereof is totally or partially destroyed or damaged from any cause whatsoever, Poseidon, at its sole cost and expense, shall make or cause to be made such repairs or replacements as are necessary to restore operation of the Project as soon as possible to the extent necessary to provide the Contract Capacity under this Agreement.

### **7.2 Distribution System Technical Studies.**

**7.2.1 System Test.** Within one hundred and eighty (180) days after the Effective Date, the Parties shall complete the development of a mutually acceptable test (the "System Test") of the effect of Product Water on the components of the District's water distribution system (the "Distribution System"). The System Test shall include circulating Product Water, meeting the Water Quality Standards, from Poseidon's pilot desalination facility and the water from the District's current imported water supply, in parallel, through two identical systems of pipes, valves and other components provided by the District which are representative of those contained in the Distribution System (the "System Test Components") for a time period sufficient (as mutually agreed by the Parties, but not to exceed six (6) months except as provided herein) to determine the relative effect of the Product Water on the System Test Components. Prior to the end of the one hundred and eighty (180) day period to complete the development of the System Test, the Corrosion Advisory Panel (as defined in Section 7.2.54) shall meet with both Parties in Carlsbad, become familiar with the project and review and comment, in writing,

on the proposed design and proposed length of the System Test. Following the conduct of the System Test, the results of the System Test shall be transmitted to the Corrosion Advisory Panel and the Corrosion Advisory Panel shall provide written comments on the interpretation of the results to both Parties. In the event that the System Test results show that the Product Water has an adverse effect on the integrity of any System Test Component which effect would not also be caused by water from the District's current imported water supply, Poseidon shall take all commercially reasonable actions to change the proposed operation of the Project to remove such adverse effect. The System Test shall be re-performed until the results thereof do not show that the Product Water has such an adverse effect on the integrity of any System Test Component. In the event that the members of the Corrosion Advisory Panel do not agree as to whether the results of the System Test show such an adverse affect on any System Test Component or whether the duration of the System Test is adequate to evaluate such an adverse effect, then the System Test shall be extended by a time period to be mutually agreed by the Parties but not to exceed an additional six (6) months. All costs of performing (and, if necessary, re-performing) the System Test shall be borne by Poseidon; provided, however that the cost of providing System Test Components, imported water and the collection, treatment, and disposal of such imported water in accordance with Applicable Law shall be borne by the District.

**7.2.2 Consumer Plumbing Test.** Within one hundred and eighty (180) days after the Effective Date, the Parties shall complete the development of a mutually-acceptable test (the "Consumer Plumbing Test") of the effect of Product Water on the components of consumer plumbing used in the District's service area, particularly on the leaching of lead and/or copper from these components. The Consumer Plumbing Test shall include circulating Product Water meeting the Water Quality Standards from Poseidon's pilot desalination facility and the water from the District's current imported water supply, in parallel, through two identical systems of consumer plumbing components (the "Consumer Test Components") for a time period sufficient (as mutually agreed by the Parties, but not to exceed six (6) months, except as provided herein) to determine the relative effect of the Product Water on the Test Components. The pipe loop test described in AWWARF, 1991, *Lead Control Strategies #406*, American Water Works Research Foundation, Denver, CO shall be used as a preliminary model of the Consumer Plumbing Test. Prior to the end of the one hundred and eighty (180) day period to complete the development of the Consumer Plumbing Test, the Corrosion Advisory Panel (as defined in Section 7.2.4) shall meet with both Parties in Carlsbad, become familiar with the project to review and comment in writing on the proposed design and proposed length of the Consumer Plumbing Test. Following the conduct of the Consumer Plumbing Test, the results of the Consumer Plumbing Test shall be transmitted to the Corrosion Advisory Panel and the Corrosion Advisory Panel shall provide written comments on the interpretation of the results to both Parties. In the event that the Consumer Plumbing Test results show that the Product Water has an adverse effect on the integrity of any Consumer Test Component or on the leaching of lead and/or copper from said Consumer Test Component which effect would not also be caused by water from the District's current imported water supply, Poseidon shall take all commercially reasonable actions to implement changes to the proposed operation of the Project to remove any such adverse impacts. The Consumer Plumbing Test shall be re-performed until the results thereof do not show that the Product Water has such an adverse effect on the integrity of any Consumer Test Component or the leaching of lead and/or copper from any Consumer Test Component. In the event that the

300

members of the Corrosion Advisory Panel do not agree as to whether the results of the Consumer Plumbing Test show an adverse effect on the integrity of any Consumer Test Component or on the leaching of lead and/or copper from any Consumer Test Component or whether the duration of the Consumer Plumbing Test is adequate to evaluate such an adverse effect, then the Consumer Plumbing Test shall be extended by a time period to be mutually agreed by the Parties, but not to exceed six (6) months. All costs of performing (and, if necessary, re-performing) the Consumer Plumbing Test shall be borne by Poseidon; provided, however that the cost of providing Consumer Test Components, imported water and the collection, treatment, and disposal of such imported water in accordance with Applicable Law shall be borne by the District.

**7.2.3 System Monitoring Plan.** Within twelve (12) months after the Effective Date of the Agreement, the Parties shall commence the development of a mutually agreeable method for monitoring the effect of Product Water on the integrity of the Distribution System (the "System Monitoring Plan"). Before the System Monitoring Plan is final, the Corrosion Advisory Panel (as defined in Section 7.2.4) shall have thirty (30) days to review the final draft System Monitoring Plan and provide written comments. The Parties shall complete the development of the System Monitoring Plan in sufficient time to allow at least one year of data collection prior to the commencement of Commercial Operation, but in no event later than twelve (12) months prior to the Projected Commencement Date. In the event that the District reasonably believes that the Product Water may have an adverse effect on the integrity of all or a material portion of the Distribution System which effect would not also be caused by the District's likely alternative water supply, the Parties shall meet to discuss such potential adverse effects. Poseidon shall take all commercially reasonable actions to implement changes to the operation of the Project to remove such an adverse effect of Product Water on the integrity of all or a material portion of the Distribution System. The cost of the System Monitoring Plan in excess of the cost which would be reasonably incurred by the District to monitor the Distribution System in the absence of the Project shall be equally shared by the Parties up to the first anniversary of the Commercial Operation. Thereafter, any additional system monitoring cost shall be borne by the District.

**7.2.4 Corrosion Advisory Panel.** Within ninety (90) days after the Effective Date, the Parties shall retain a review panel (the "Corrosion Advisory Panel"), composed of two nationally recognized experts with experience in the design and conduct of tests on the corrosiveness of water to system and consumer plumbing components. Each Party shall have the right to appoint one member of the Corrosion Advisory Panel. The Corrosion Advisory Panel shall be retained to review the design and length of the System Test and the Consumer Plumbing Test, the interpretation of the results of said tests and the design of the System Monitoring Plan, as more specifically provided in Section 7.2.1 and 7.2.2. The Corrosion Advisory Panel shall meet one time in Carlsbad to become familiar with the project, to review and comment, in writing, on the design and the proposed length of the said tests before the design and length of said tests are finalized. Following the conduct of the said tests, the results of said tests shall be transmitted to the Corrosion Advisory Panel and the Corrosion Advisory Panel shall provide written review comments to the Parties. If the members of the Corrosion Advisory Panel do not agree with each other on any advice or recommendation on any

301

matter, each member shall report his or her advice or recommendation on said matter independently. Having reviewed and considered the advice and recommendations of the Corrosion Advisory Panel, the Parties shall make their own independent judgments about the design and length of the System Test and the Consumer Plumbing Test, and the design of the System Monitoring Plan and about the interpretation of the results from the System Test and the Consumer Plumbing Test.

## **8. WATER QUALITY.**

**8.1 Water Quality Issues.** With respect to Product Water produced by the Project, Poseidon and the District agree to work cooperatively to conduct, prior to determinations of the Delivery Regime and Interconnection Points, mutually acceptable technical studies pertaining to quality, blending, distribution and consumer acceptance (including without limitation customer issues, such as color, cloudiness, taste and odor) of Product Water, the impact of Product Water Quality on customer uses of water, the impact of Product Water on the integrity of existing pipelines, and the impact of additional discharge of municipal and industrial waste from Project facilities (collectively "Water Quality Issues"). These studies shall include advice from a nationally recognized expert on the impact of boron in irrigation water on ornamental plants (the "Boron Expert"). The Boron Expert shall be mutually acceptable to both Parties. Except as provided in Sections 7.2.1, 7.2.2 and 7.2.3, Poseidon, at its cost and expense, shall be responsible for such technical studies related to the Water Quality Issues. The Delivery Regime and any revisions to the Quality Standards for Product Water shall take into account the results of the technical studies described above. Without limiting the generality of the foregoing, Poseidon and the District agree to meet prior to the Commercial Operation Date, and, upon request of the District, during the Term on a periodic basis with the District's major water customers, such as breweries, nurseries, landscape irrigators, agricultural growers, biotechnology companies and cleaners, to discuss and work to resolve issues those customers may have with receiving Product Water. Poseidon shall cooperate with the District in resolving Water Quality Issues. Notwithstanding the foregoing, any change in the Delivery Regime or Quality Standards developed pursuant to this Agreement shall be mutually agreed by the Parties.

**8.2 Quality Standards. Compliance with Law, Pressure Parameters and Water Quality Standards.** All Product Water produced by the Project and delivered to the Delivery Points must meet all of the following standards (collectively the "Quality Standards"):

- (a) all drinking water quality standards under Applicable Law (whether now in force or hereafter adopted) and action levels now in force or hereafter adopted by the California Department of Health Services, (b) the water quality specifications set forth in Schedule 8.2. and (c) any mutually-agreed change to the Quality Standards with respect to the Water Quality issues described in Section 8.1 above or otherwise identified in the technical studies performed with respect to such Water Quality Issues. Attached as Schedule 8.2 are the Quality Standards with respect to the Project as of the Effective Date. The Quality Standards in Schedule 8.2 include permitted variations for each water quality parameter specified. If the Product Water produced by the Project at any time fails to meet all Quality Standards, then Poseidon immediately shall notify the District, and the District and Poseidon shall meet promptly thereafter to determine what corrective measures, if any, need to be taken. The Parties acknowledge that corrective

measures may include, without limitation, segregating Product Water that fails to meet all Quality Standards. Poseidon shall be responsible for any and all state and federal fines resulting from Product Water that does not meet Applicable Law for drinking water quality.

**8.3 Finalization of Water Quality Specification for Boron.** The Parties shall use commercially reasonable efforts to determine, within one hundred and eighty (180) days after the Effective Date, mutually-acceptable concentration limits for Boron to be included in Schedule 8.2.

**8.4 District's Non-Acceptance.** The District shall not be obligated to accept or pay for Product Water of quality that does not meet the Quality Standards.

**8.5 Compliance with Regulations on Water Quality.** As a purveyor of drinking water, the District is required to comply with regulations that address water quality in the Distribution System and at the consumer's tap ("Consumer Quality Standards"). If, following the introduction of Product Water, the District is in violation of the Consumer Quality Standards, then the District immediately shall notify the Poseidon, and the District and Poseidon shall meet promptly thereafter to determine what corrective measures, if any, need to be taken. If a Product Water Causation Event (as defined below) occurs, then the District, upon written notice to Poseidon, may suspend deliveries of Product Water, and the District shall not be obligated to pay for Product Water that causes the District to be in violation of the Consumer Quality Standards; provided, however that prior to such suspension the District and Poseidon shall use all commercially reasonable efforts to implement alternative corrective measures to address a violation of the Consumer Quality Standards. A "Product Water Causation Event" shall mean the occurrence of the following three (3) conditions: (i) Product Water causes the District be in violation of the Consumer Quality Standards, (ii) such violation would not be caused by the District's likely alternative water supply and (iii) such violation is not also caused in whole or in part by any action or omission of the District. Poseidon shall be responsible for any and all state and federal fines resulting from a Product Water Causation Event. With respect to the issue of causation of a District violation of the Consumer Quality Standards, nothing set forth in this Section 8.5 shall be deemed or construed to shift the burden of proof to Poseidon, or as a waiver by Poseidon of any claims or defenses.

## **9. DELIVERY OF WATER.**

**9.1 Delivery of Water.** Subject to Sections 3.2.2 and 9.2, Poseidon shall pay for all costs and expenses whatsoever of the delivery of Product Water to the Delivery Points in accordance with this Agreement, including without limitation all costs and expenses of compliance with all Applicable Laws related to the delivery of Product Water by Poseidon under the provisions of this Agreement. The District shall be responsible for all costs and expenses incurred after delivery of Product Water at the Delivery Points by Poseidon in compliance with this Agreement. Subject to Section 8.5, the District shall accept all Product Water meeting the Quality Standards made available at the Delivery Points in accordance with the Delivery Regime.

**9.2 Delivery Points.** The Parties shall use commercially reasonable efforts to determine, within twelve (12) months after the Effective Date, mutually-acceptable interconnection points ("Interconnection Points") for the interconnection of the Appurtenant Facilities with the Distribution System. Poseidon, at its cost and expense, shall construct all conveyance facilities, pipelines, pumps, pump stations and any other infrastructure (the "Appurtenant Facilities") necessary or required to deliver the Product Water to the Interconnection Points. At any time after the Interconnection Points have been determined, the District may notify Poseidon that the District elects to: (i) own the Appurtenant Facilities (except for the pumping station located at the Encina Power Station) upon their completion or (ii) have a joint powers authority own the Appurtenant Facilities, provided such joint powers authority has equivalent capabilities to those of the District to operate and maintain the Appurtenant Facilities. If the District makes such an election, the Parties shall negotiate in good faith on the terms of an agreement (the "Appurtenant Facilities Agreement") to: (i) transfer the Appurtenant Facilities to the District (or a joint powers authority as described above) for a nominal amount; and (ii) provide for the operation and maintenance of the Appurtenant Facilities by the District (or a joint powers authority as described above) (including their operation to transport Product Water in excess of the Contract Capacity for third-parties on terms sufficient to support Poseidon's obligations to such third-parties). If the District makes such an election, the "Delivery Point" for the purpose of this Agreement shall be the connection of the Project and the Appurtenant Facilities; otherwise the Delivery Point(s) shall be the Interconnection Point(s). If the District (or a joint powers authority as described above) operates the Appurtenant Facilities the Base Price shall be reduced by the non-capital portion of the Delivery Charge which represents Poseidon's projected cost of operating and maintaining the Appurtenant Facilities. If the District has elected to own, or have a joint powers authority own, the Appurtenant Facilities, the District may, at any time up to one hundred and eighty (180) days before the Projected Commencement Date, elect to finance the cost of the Appurtenant Facilities; provided that the District's proposed financing structure shall not adversely affect Poseidon's ability to finance the Project or perform its other obligations under this Agreement. If the District makes such an election, the Base Price shall be reduced by the capital portion of the Delivery Charge which represents Poseidon's projected cost of financing construction and operation of the Appurtenant Facilities.

**9.3 Delivery Schedule.** Poseidon and the District shall use commercially reasonable efforts to develop, within twelve (12) months after the Effective Date, a mutually acceptable delivery regime (the "Delivery Regime") for the delivery of Product Water from the Project to the District. The Delivery Regime shall include a schedule of delivery so that the average daily amount delivered to the District after the Commercial Operation Date is sufficient to meet the District's minimum daily requirements for Product Water (up to the Contract Capacity). The Delivery Regime also shall be developed in coordination with the delivery regimes for other purchasers of Product Water from the Project and for Product Water delivery prior to the Commercial Operation Date to the extent Product Water meets the Quality Standards and can be sold to the District prior to the Commercial Operation Date under Applicable Law.

**9.4 Conveyance Losses.** Poseidon shall be responsible for any water losses incurred in the delivery of Product Water to the District up to the Delivery Point.

**9.5 Meters and Records.** The Delivery Regime shall include mutually acceptable procedures addressing the locations, testing and use of appropriate measurement devices to measure the quantity and quality of Product Water delivered to the District. At a minimum, all water release structures at the Delivery Points shall be equipped with totalizing flow meters and Poseidon shall prepare and keep monthly readings therefrom. Throughout the Term, Poseidon shall maintain records in accordance with the requirements of Applicable Laws and generally accepted accounting principles, as appropriate, pertaining to the quantity and quality of water delivered pursuant to this Agreement. The District shall be entitled to read the meters at least once per month during regular business days and hours and to request and receive from Poseidon copies of all such water delivery, quantity and quality records.

**9.6 Reports.** On or before the tenth (10th) day of each month during the Term commencing after the Commercial Operation Date, Poseidon shall send written reports to the District setting forth the amount of Product Water and the quality of Product Water delivered to the Delivery Points during the immediately preceding month pursuant to this Agreement.

**9.7 Liquidated Damages for Failure to Deliver.** If Poseidon shall fail to deliver at least ninety-six percent (96%) (the "Threshold") of the Product Water meeting the Quality Standards required by the Delivery Regime for any Initial Period or Extended Period (as each are defined below) for any reason other than a Force Majeure event (as defined in Section 17 hereof) or a breach of this Agreement by the District, then Poseidon shall pay the District as liquidated damages and not as a penalty: (i) for an Initial Period, an amount equal to the positive difference, if any, between the (A) per acre foot cost incurred by the District to obtain water and (B) Purchase Price, for each acre foot of Product Water below the Threshold for the Initial Period that Poseidon failed to deliver; and (ii) for an Extended Period, an additional amount equal to fifty dollars (\$50) per acre foot, for each acre foot of Product Water below the Threshold for the Extended Period that Poseidon failed to deliver. "Initial Period" shall mean, as of any day commencing on or after the thirtieth (30th) day after the Commercial Operation Date, the thirty (30) days immediately preceding such day. "Extended Period" shall mean, as of any day commencing on or after the one hundred and eightieth (180th) day after the Commercial Operation Date, the one hundred and eighty (180) days immediately preceding such day. Poseidon shall make payment of any liquidated damages by the thirtieth (30th) day of the month immediately following the month containing the last day of the Initial Period(s) or Extended Period(s) for which such liquidated damages arose. If Poseidon pays liquidated damages pursuant to this Section 9.7 for any Initial Period for Product Water Poseidon failed to deliver, Poseidon shall, solely for the purpose of determining whether Poseidon has met the Threshold in subsequent Initial Periods, be deemed to have delivered such Product Water. If Poseidon pays liquidated damages pursuant to this Section 9.7 for any Extended Period for Product Water Poseidon failed to deliver, Poseidon shall, solely for the purpose of determining whether Poseidon has met the Threshold in subsequent Extended Periods, be deemed to have delivered such Product Water. Poseidon expressly acknowledges that this provision is reasonable under the circumstances existing as of the date of this Agreement. The Parties acknowledge that (i) the determination of the actual damages which are liquidated pursuant to this Section 9.7 is impracticable or extremely difficult, (ii) otherwise obtaining an adequate remedy is inconvenient and (iii) the liquidated damages provided for under this Section 9.7 constitute a reasonable



approximation of the harm or loss. The Parties agree that unless the failure to deliver Product Water constitutes a Poseidon Event of Default pursuant to Section 14.1.1 (in which case, this Section 9.7 shall no longer apply in the event the District pursues its remedies for a Poseidon Event of Default), the payment of such liquidated damages shall be the District's sole remedy for Poseidon's failure to deliver Product Water to the District. Poseidon's obligations under this Section 9.7 shall not be reduced or otherwise affected by any balance in the Tracking Account.

**9.8 District Failure to Accept Product Water.** To the extent Poseidon is unable to deliver Product Water as required by the Delivery Regime as a result of a breach of this Agreement by the District, the District shall make payment for such undelivered Product Water ("Undelivered Water") as if such Undelivered Water had been delivered to the District. Upon the request of the District, Poseidon shall use commercially reasonable efforts to sell such Undelivered Water to third parties. Amounts received by Poseidon from the sale of such Undelivered Water shall be paid to the District until the District has been reimbursed for the amount paid by the District for such Undelivered Water pursuant to this Agreement. The Parties agree that, unless the failure to accept Product Water constitutes a District Event of Default pursuant to Section 14.3.2 (in which case, this Section 9.8 shall no longer apply in the event Poseidon pursues its remedies for a District Event of Default), the District's payment for Undelivered Water shall be Poseidon's sole remedy for the District's failure to accept Product Water as a result of a breach by the District.

## **10. PRIORITY FOR PROJECT WATER, PRICE REDUCTION.**

**10.1 Priority** Poseidon shall not prefer any person, public corporation, agency, or other consumers over the District with respect to delivery of water from the Project as a customer of Poseidon; provided, however that in the event that the Project does not produce enough Product Water for Poseidon to meet its obligations to the District under this Agreement and to other purchasers of Product Water (a "Shortfall"), then for the first five (5) days of any such Shortfall Poseidon may allocate Product Water so that the effects of the Shortfall are first borne by the District for such five (5) day period. If the Shortfall lasts more than five (5) days, then Poseidon shall allocate Product Water so that the effects of the Shortfall are first borne by such other purchasers for the second five (5) day period of such Shortfall. If a Shortfall lasts more than ten (10) days, Poseidon shall allocate Product Water for the remainder of the Shortfall proportionately among all purchasers (including the District) based upon amounts of Product Water each purchaser is obligated to purchase from Poseidon. Nothing in this Section 10.1 shall limit Poseidon's obligations under Section 9.7 or the District's remedies upon the occurrence of a Poseidon Event of Default. Poseidon's obligations under this Agreement shall not be affected by any agreements entered into by Poseidon and other purchasers of Product Water.

**10.2 Price Reduction** If Poseidon sells, conveys or transfers Product Water for a price per acre foot that is less than the Base Price but otherwise on substantially the same terms and conditions as contained in this Agreement, the Base Price immediately shall be lowered to such lesser price per acre foot for all purchases of Product Water during the period Poseidon makes such third-party sales. If Poseidon fails to lower the Base Price as aforesaid, then for all such sales of Product Water for which the Base Price was not lowered, the District shall receive a credit toward the Purchase Price that is equal to the amount by which the Base Price charged

306

under this Agreement exceeded such lesser price per acre foot for the amount of Product Water sold by Poseidon at such lesser price per acre foot.

## **11. USE OF MAERKLE RESERVOIR.**

**11.1 Maerkle Lease.** Provided an uncured Poseidon Event of Default has not occurred, then upon Poseidon's request, the District may lease to Poseidon, for an initial term of not less than thirty (30) years after the Commercial Operation Date, capacity rights in Maerkle Reservoir sufficient to store Product Water in amounts determined necessary by Poseidon, and agreed to by the District, for delivery of Product Water produced by the Project to wholesale customers other than the District. The lease (the "Maerkle Lease") will be consistent with the principles for joint use of Maerkle Reservoir more particularly set forth in Section 11.4 below.

**11.2 Appurtenant Facilities.** If the Parties enter into the Maerkle Lease, then Poseidon, at its cost and expense, shall construct all: (a) Appurtenant Facilities necessary or required to move Product Water into Maerkle Reservoir; and (b) all facilities necessary or required to move Product Water out of Maerkle Reservoir for the purpose of delivering such Product Water to wholesale customers other than the District. Subject to any adjustment to the Delivery Charge pursuant to Section 9.2, Poseidon also shall be responsible for all capital, operating and maintenance costs associated with connecting Maerkle Reservoir to such Appurtenant Facilities as are necessary to transport Product Water into Maerkle Reservoir and to such facilities as are necessary to transport Product Water out of Maerkle Reservoir for the purpose of delivering such Product Water to wholesale customers other than the District.

**11.3 District's Obligation.** The District will operate and be responsible for all operating and maintenance costs associated with facilities for transporting installments of Contract Capacity purchased by the District from the Delivery Points into the Distribution System.

**11.4 Principles for Joint Use.** Poseidon and the District shall cooperate to develop mutually-acceptable principles for joint use of Maerkle Reservoir consistent with the intent of this Agreement. The principles for joint use shall be included in the Maerkle Lease and will address, without limitation, the following issues: (a) quantification of Poseidon's leased capacity right; (b) the number and length of extension terms (which shall be at least coextensive with the Term of this Agreement); (c) rent and/or other consideration Poseidon will pay or provide the District in consideration for the lease of capacity rights, use of District property and operation of Maerkle Reservoir (provided however, that Poseidon shall not have to pay rent and/or other consideration to the extent its leased capacity right is used to deliver Product Water to the District); (d) a reservoir operating plan and water delivery regime that takes into consideration the District's operational and 10-day storage requirements; and (e) water quality and regulatory compliance.

**12. INSURANCE.** From commencement of construction of the Project, Poseidon shall obtain and maintain, or cause to be obtained and maintained, the types and amounts of insurance coverages for the Project set forth on Schedule 12. The District may require Poseidon to obtain and maintain insurance coverages in addition to those described on Schedule 12 (the "Additional

Insurance”), subject to (i) such Additional Insurance being commercially available and (ii) the District reimbursing Poseidon for the cost of the premiums for such Additional Insurance. Poseidon shall deliver proof reasonably acceptable to the District of properly executed insurance coverages evidencing compliance with the insurance requirements herein at least ten (10) days prior to Poseidon’s anticipated date for commencement of construction of the Project (the “Projected Commencement Date”).

**12.1 Form.** Each policy required under Section 12 shall: (a) be provided at Poseidon's expense; (b) be issued by an insurance company which maintains a Best's rating of at least A- during the term of the applicable policy or is otherwise reasonably acceptable to the District and (c) require the insurer to provide the District thirty (30) days prior written notice (ten (10) days for non-payment of premium), by certified mail, return receipt requested, of cancellation or intent not to renew any policy of insurance required in this Agreement. Certificates and endorsements evidencing such insurance coverage shall be delivered to the District by Poseidon prior to the Projected Commencement Date. To the extent that an insurance company providing a policy required under this Section 12 fails to maintain a Best’s rating of at least A- and is not otherwise reasonably acceptable to the District, Poseidon shall promptly replace such insurance company with a company meeting the requirements of this Section 12.1. Current Insurance Service Office (ISO) or other reasonable and customary policies, forms and endorsements or broader shall be used where applicable.

**12.2 District's Right to Procure.** If Poseidon fails to keep the insurance coverages required in this Agreement in full force and effect with insurance companies which maintain a Best’s rating of at least A- or which are otherwise reasonably acceptable to the District, the District, subject to the rights of Poseidon’s lenders, may (but shall have no obligation to) at any time or from time to time, after giving notice thereof to Poseidon, procure such insurance and pay the premiums therefor, in which event Poseidon shall repay the District all sums paid by the District, and any costs or expenses incurred by the District in connection therewith, together with interest thereon at the Overdue Rate from the date due until paid in full, within ten (10) days following the District's written demand to Poseidon for such payment. The cost of such insurance premium and the cost of any claims or losses for which Poseidon would be liable to the District under this Agreement which fall within the applicable deductibles or self-insured retention amounts may be deducted, at the option of the District, from payments otherwise due Poseidon. The District shall be under no obligation to purchase such insurance or be responsible for the coverages purchased or the financial stability or responsibility of the insurance company used. The decision to purchase such insurance coverages shall in no way be construed as a waiver of the District's rights under this Agreement.

**12.3 Deductibles, Excess Claims.** The District shall not be responsible for the amount of any deductibles, self-insured retention, or claims which are not covered and claims which exceed available insurance coverage.

**12.4 Additional Insureds.** The District, the City and the RDA each shall be named as additional insureds on all policies of liability insurance required by this Agreement, other than workers' compensation, but including employer's liability.

308

**12.5 Waiver of Subrogation.** Poseidon shall require its insurance carrier(s) furnishing the insurance required herein to waive all rights of subrogation against the District, including without limitation each of its directors, officers, agents, representatives and employees, for any and all amounts of claims paid from insurance proceeds. The District shall waive all rights of subrogation against Poseidon, including its directors, officers, agents, representatives and employees, for any and all amounts of claims paid from insurance proceeds.

**12.6 Statement of Insurance.** If at any time the District requests a written statement from any of Poseidon's insurers as to any impairments to any aggregate policy limit, Poseidon promptly shall authorize and have delivered such statement to the District.

**12.7 Primary Insurance for Additional Insureds.** Poseidon's insurance policies shall provide that the insurance afforded by those policies to the additional insureds is primary to all insurance or self-insurance carried by the District. Poseidon acknowledges that all insurance or self-insurance carried by the District is strictly excess and shall not contribute with Poseidon's liability insurance.

### **13. CONDITIONS, ADDITIONAL ASSISTANCE**

**13.1 Poseidon's Conditions.** Poseidon's obligations to sell Product Water to the District pursuant to this Agreement shall be subject to satisfaction or waiver by Poseidon, in its reasonable discretion, of the following conditions prior to the Commercial Operation Date:

**13.1.1 CEQA Compliance.** All requirements for complying with CEQA shall have been satisfied, and no legal challenge to compliance with CEQA shall have been filed within thirty-five (35) days of such compliance, or, if filed, a court of competent jurisdiction shall have entered a final judgment sustaining or validating such CEQA compliance.

**13.1.2 Compliance with Applicable Laws.** Poseidon shall have completed construction of the Project in accordance with all Applicable Laws and Prudent Industry Practices.

**13.1.3 Governmental Approvals.** Poseidon shall have obtained and maintained (or caused its appropriate subcontractors to obtain and maintain) all Governmental Approvals for the construction of the Project, including the Appurtenant Facilities, and for the sale and delivery of Product Water.

**13.1.4 Maerkle Lease.** If Poseidon has requested its execution, the Maerkle Lease shall have been entered into in accordance with Section 11 hereof.

**13.1.5 Additional Water Purchase Agreements.** Poseidon shall have entered into agreements with other purchasers for the remaining output of the Project.

**13.1.6 Supplemental Agreements.** Poseidon shall have entered into Supplemental Agreements in accordance with Section 1.2.

309

**13.1.7 Product Water Delivery and Quality.** The Parties shall have agreed upon the Delivery Points, the Delivery Charge, the Monitoring System and the Delivery Regime. The System Test shall have been successfully completed.

**13.2 District's Conditions.** The District's obligations to purchase Product Water (other than the Purchase of Product Water prior to the Commercial Operation Date pursuant to the Delivery Regime and to the extent permitted under Section 9.3) from Poseidon pursuant to this Agreement shall be subject to satisfaction or waiver by the District, in its reasonable discretion, of the following conditions prior to the Commercial Operation Date:

**13.2.1 CEQA Compliance.** All requirements for complying with CEQA shall have been satisfied, and no legal challenge to compliance with CEQA shall have been filed within thirty-five (35) days of such compliance, or, if filed, a court of competent jurisdiction shall have entered a final judgment sustaining or validating such CEQA compliance.

**13.2.2 Compliance with Applicable Laws.** Poseidon shall have completed construction of the Project in accordance with all Applicable Laws and Prudent Industry Practices in all material respects.

**13.2.3 Performance Test.** Poseidon shall have completed the Performance Test successfully.

**13.2.4 Governmental Approvals.** Poseidon shall have obtained and maintained (or caused its appropriate subcontractors to obtain and maintain) all Governmental Approvals for the construction of the Project, including the Appurtenant Facilities, and for the sale and delivery of Product Water.

**13.2.5 Maerke Lease.** If Poseidon has requested its execution, the Maerke Lease shall have been entered into in accordance with Section 11 hereof.

**13.2.6 Subsidy.** The District shall have entered into agreements with all appropriate parties on mutually acceptable terms and conditions pursuant to which the District shall receive, either in cash or in credit, the Subsidy.

**13.2.7 Supplemental Agreements.** Poseidon shall have entered into Supplemental Agreements in accordance with Section 1.2.

**13.2.8 Product Water Delivery and Quality.** The Parties shall have agreed upon the Delivery Points, the Delivery Charge, the Monitoring System and the Delivery Regime. The System Test shall have been successfully completed.

**13.2.9 Development Agreement.** Poseidon and the City shall have entered into a development agreement (the "Development Agreement"), containing the terms and conditions set forth in Exhibit 13.2.9 and such other terms and conditions which are mutually acceptable to Poseidon and the City, and the District shall have determined, in its reasonable judgment, that

310

the lease between Poseidon and Cabrillo Power I LLC is valid and that the Development Agreement can run with the leasehold interest created thereby.

**13.2.10 Back-up Water Supply.** The District shall have received an acknowledgment from the Authority that the District is eligible to receive a back-up supply of water from the Authority on terms generally available to the Authority's member agencies.

**13.3 Additional Assistance.** Upon request by Poseidon the District shall cooperate with Poseidon in obtaining (i) additional purchasers of Product Water from the Project and (ii) wastewater treatment services as needed for the Project, so long as such cooperation does not impose any cost, expense or other adverse effect on the District outside of the normal course of business. Poseidon acknowledges that the cooperation of the District with respect to wastewater treatment services does not constitute a commitment to provide such services and that such services are subject to the availability of sufficient treatment or conveyance capacity.

#### **14. DEFAULTS AND REMEDIES.**

**14.1 Default by Poseidon.** The occurrence of any of the following (unless caused by a Force Majeure event or a breach of this Agreement by the District) shall constitute a "Poseidon Event of Default" under this Agreement:

**14.1.1 Failure to Deliver Water Supply.** Poseidon's failure to deliver at least (i) eighty seven and one half percent (87.5%) of the Product Water required to be delivered to the District in accordance with the Delivery Regime for any Year Period and (ii) at least 50% of the Product Water required to be delivered to the District in accordance with the Delivery Regime for the six (6) month period commencing on the Commercial Operation Date. For the purpose of this Section 14.1.1 and Section 14.3.2, "Year Period" shall mean, as of any day commencing on or after the one (1) year anniversary of the Commercial Operation Date, the three hundred and sixty five (365) days immediately preceding such day;

**14.1.2 Extended Water Supply Shortfall.** Poseidon's failure to supply at least the Threshold amount of the Product Water required to be delivered to the District pursuant to the Delivery Regime for any five (5) out of eight (8) Water Years (an "Extended Shortfall"); provided, however that the occurrence of an Extended Shortfall shall not constitute a Poseidon Event of Default unless upon such occurrence: (i) the District is unable to acquire water from an alternative source sufficient to make up the shortfall in the Contract Capacity to be provided to the District hereunder, or (ii) the blending of Product Water with alternative supplies of water obtained by the District to make up such shortfall has a material adverse effect on the quality of water in the Distribution System.

**14.1.3 Failure to Meet Water Quality Standards.** Poseidon's failure to comply with its obligations under Section 8.2;

**14.1.4 Failure to Perform.** Poseidon's failure to observe or perform any of the provisions of this Agreement to be observed or performed by Poseidon (other than the failure to deliver Product Water, to which Sections 14.1.1 and 14.1.2 apply, or the failure to comply with

311

Section 8.2, to which Section 14.1.3 applies), where such failure shall continue for a period of thirty (30) days after written notice of such failure from the District to Poseidon; provided, however, that if the nature of Poseidon's default under this Section 14.1.4 is such that more than thirty (30) days are required for its cure, then Poseidon shall not be deemed to be in default if Poseidon commences such cure within such thirty (30) day period and thereafter diligently prosecutes such cure to completion;

**14.1.5 Failure to Perform Related Agreements.** The occurrence of an event of default of Poseidon under any other agreement between the Parties which specifically provides that an event of default under such agreement shall constitute an Event of Default under this Agreement;

**14.1.6 Representations and Warranties.** Any representation or warranty under Section 16 of this Agreement was, when made or supplied, materially untrue and (i) such misrepresentation shall continue uncured for thirty (30) or more days from the date Poseidon notifies the District of such misrepresentation or (ii) Poseidon fails to notify the District of such misrepresentation within thirty (30) days after Poseidon has knowledge of such misrepresentation; and

**14.1.7 Bankruptcy.** The making by Poseidon of any general arrangement or assignment for the benefit of creditors; Poseidon's becoming bankrupt, insolvent or a "debtor" as defined in the United States Bankruptcy Code or any successor statute (unless, in the case of a petition filed against Poseidon, such petition is dismissed within ninety (90) days after its original filing); the institution of proceedings under the bankruptcy or similar laws in which Poseidon is the debtor or bankrupt; the appointing of a trustee or receiver to take possession of substantially all of Poseidon's assets or of Poseidon's interest in this Agreement (unless possession is restored to Poseidon within ninety (90) days after such taking); the attachment, execution or judicial seizure of substantially all of Poseidon assets or Poseidon's interest in this Agreement (unless such attachment, execution or judicial seizure is discharged within ninety (90) days after such attachment, execution or judicial seizure).

## **14.2 District's Remedies.**

**14.2.1 General.** Subject to Section 14.2.2 below, if a Poseidon Event of Default as set forth above shall occur, the District, upon the lapse of the applicable cure period, if any, as also set forth above, may terminate this Agreement and/or pursue any remedy available to it at law or in equity, including without limitation commencing an action against Poseidon for damages recoverable under Section 14.5 incurred by the District in connection with any such event of default.

**14.2.2 Transfer of Project.** In lieu of pursuing any remedy available to it at law or in equity as a result of a Poseidon Event of Default after the Commercial Operation Date, the District shall have the option to terminate the Agreement and take possession of the Project upon (i) payment to Poseidon of an amount sufficient to prepay in full Poseidon's indebtedness incurred for the Project, including all unpaid principal interest, fees and any other amounts (including breakage, prepayment or termination costs) payable to Poseidon's lenders and

312

(ii) receipt of any consent necessary under the lease agreement between Poseidon and Cabrillo Power I LLC.

**14.2.3 Step-In Right.** If a Poseidon Event of Default shall occur after the Commercial Operation Date and the Project is not in operation, the District may enter the Site and operate the Project (the "Step-In Right") until such time as the District receives a notice from Poseidon that it is ready to re-commence the operation of the Project. If the District elects to exercise its Step-In Right: (i) the District shall operate the Project in accordance with Applicable Laws and Prudent Industry Practice, (ii) the District shall use reasonable efforts to provide Product Water as required pursuant to any agreement between Poseidon and third-party purchasers and (iii) all amounts reasonably incurred by the District for operating and capital expenditures made with respect to the Project shall be credited against amounts owed by the District under this Agreement. The District's Step-In Right shall terminate upon the termination of this Agreement.

**14.3 Default by District.** The occurrence of any of the following (unless caused by a Force Majeure event or a breach of this Agreement by Poseidon) shall constitute a "District Event of Default" under this Agreement:

**14.3.1 Failure to Pay.** The District's failure to pay amounts under this Agreement as and when due, where such failure shall continue for a period of fifteen (15) days after the District has received an Overdue Notice from Poseidon;

**14.3.2 District Failure to Accept Product Water.** The District's failure to: (i) accept at least eighty-seven and one half percent (87.5%) of the Product Water required to be accepted by the District in accordance with the Delivery Regime for any Year Period.

**14.3.3 Failure to Perform.** The District's failure to observe or perform any of the provisions of this Agreement to be observed or performed by the District (other than the failure to make any payments under this Agreement, to which Section 14.3.1 applies or the failure to accept Product Water, to which Section 14.3.2 applies), where such failure shall continue for a period of thirty (30) days after written notice of such failure from Poseidon to the District; provided, however, that if the nature of the District's default is such that more than thirty (30) days are required for its cure, then the District shall not be deemed to be in default if the District commences such cure within such thirty (30) day period and thereafter diligently prosecutes such cure to completion;

**14.3.4 Failure to Perform Related Agreements.** The occurrence of an event of default of the District under any other agreement between the Parties which specifically provides that an event of default under such agreement shall constitute an Event of Default under this Agreement; and

**14.3.5 Representations and Warranties.** Any representation or warranty under Section 15 of this Agreement was, when made or supplied, materially untrue and (i) such misrepresentation shall continue uncured for thirty (30) or more days from the date the District notifies Poseidon of such misrepresentation, or (ii) the District fails to notify Poseidon of such



misrepresentation within thirty (30) days after the District has knowledge of such misrepresentation.

**14.4 Poseidon's Remedies.** If a District Event of Default as set forth above shall occur, Poseidon, upon the lapse of the applicable cure period, as also set forth above, may terminate this Agreement and/or pursue any remedy available to it at law or in equity, including without limitation commencing an action against the District for damages recoverable under Section 14.5 incurred by Poseidon in connection with any such event of default.

**14.5 Damages Recoverable.** For the breach of a contractual obligation under this Agreement, the measure of damages is the amount which will compensate the non-breaching party for the detriment proximately caused thereby, or which, in the ordinary course of things, is foreseeable as a probable result of the breach, subject to any applicable defenses with respect to such damages. Loss may be foreseeable as a probable result of the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, of which as of the Effective Date the breaching party knew or should have known. Damages are not recoverable for loss that the breaching party did not have reason to foresee as of the Effective Date as a probable result of the breach.

**15. REPRESENTATIONS AND WARRANTIES OF THE DISTRICT.** The District hereby makes the following representations and warranties to Poseidon, as of the Effective Date and (unless specifically made only as of the Effective Date) as of the Commercial Operation Date:

**15.1 Organization.** The District is a municipal water district, organized and validly existing under the laws of the State of California.

**15.2 Authorization.** The District has the power and authority to enter into and to perform its obligations under this Agreement. The District has: (a) duly authorized this Agreement; (b) approved the execution and delivery of this Agreement; and (c) duly executed and delivered this Agreement by a duly authorized individual.

**15.3 Enforceability.** This Agreement constitutes the valid and legally binding obligation of the District, enforceable against the District in accordance with its terms.

**15.4 Governmental Consents.** No Legal Entitlement from any Governmental Authority is required in connection with the execution and performance of this Agreement by the District. All Legal Entitlements required in connection with the District's performance of this Agreement will be obtained as and when required by Applicable Laws.

**15.5 No Litigation.** As of the Effective Date, there is no action, suit, proceeding or investigation pending or, to the District's actual knowledge, threatened against the District which, if adversely determined, would affect the validity of this Agreement.

**15.6 No Conflict.** The execution and performance of this Agreement by the District does not breach or constitute a default by the District under any law, regulation, ruling, court

314

order, agreement, indenture, certificate of preference, or undertaking or other instrument to which the District is a party or by which the District or any of its property may be bound or affected.

**16. REPRESENTATIONS AND WARRANTIES OF POSEIDON.** Poseidon hereby makes the following representations and warranties to the District, as of the Effective Date and (unless specifically made only as of the Effective Date) as of the Commercial Operation Date:

**16.1 Organization.** Poseidon is a limited liability company, duly formed and validly existing under the laws of the State of Delaware, and duly qualified to do and doing business in the State of California.

**16.2 Authorization.** Poseidon has the power and authority to enter into and to perform its obligations under this Agreement. Poseidon has: (a) duly authorized this Agreement; (b) approved the execution and delivery of this Agreement; and (c) duly executed and delivered this Agreement by a duly authorized individual.

**16.3 Enforceability.** This Agreement constitutes the valid and legally binding obligation of Poseidon, enforceable against Poseidon in accordance with its terms.

**16.4 Governmental Consents.** No Legal Entitlement from any Governmental Authority is required in connection with the execution and performance of this Agreement. by Poseidon. All Legal Entitlements required in connection with Poseidon's performance of this Agreement will be obtained as and when required by Applicable Laws.

**16.5 No Litigation.** As of the Effective Date, there is no action, suit, proceeding or investigation pending or, to Poseidon's actual knowledge, threatened against Poseidon which, if adversely determined, would affect the validity of this Agreement.

**16.6 No Conflict.** The execution and performance of this Agreement by Poseidon does not breach or constitute a default by Poseidon under any law, regulation, ruling, court order, agreement, indenture, certificate of preference, or undertaking or other instrument to which Poseidon is a party or by which Poseidon or any of its property may be bound or affected.

## **17. FORCE MAJEURE.**

**17.1 Defined.** "Force Majeure" as used herein means any act, event or condition affecting the Project, the District, Poseidon or any of the District's or Poseidon's respective subcontractors to the extent that it materially and adversely affects the ability of either Party to perform any obligation under this Agreement (except for payment obligations) as long as such act, event or condition is beyond the reasonable control of such Party and is not a result of the willful or negligent action of the Party relying thereon. Neither Party shall have any right to obtain reimbursement from the other Party for the costs of any Force Majeure event.

**17.2 Force Majeure Examples.** Acts or events constituting Force Majeure may include without limitation the following: (a) an act of God (but not including reasonably

315

anticipated weather conditions for the geographic area of the Project), landslide, earthquake, fire, explosion, flood, sabotage or similar occurrence; (b) acts of a public enemy, extortion, war, blockade or insurrection, riot or civil disturbance; (c) the failure of any appropriate Governmental Authority or private utility to provide and maintain utilities; (d) strikes, lock outs, work stoppages or labor disputes (other than those of employees of Poseidon); (e) underground or latent conditions not known prior to the date of this Agreement; (f) the presence at, on or under the Project of (i) subsurface structures, materials, or conditions having historical, geological, archaeological, religious or similar significance or (ii) any habitat of an endangered, environmentally sensitive, or protected species; (g) the presence of hazardous waste or biologically toxic substances at, on or under the Project unless caused by the Party claiming Force Majeure; (h) the inability to obtain influent water of sufficient quantity or quality; (i) a Change in Law that would materially and adversely affect the ability of either Party to perform any material obligation under this Agreement; (j) any denial of an application for or a delay in the review, issuance or renewal of, or the suspension, termination or interruption of, any permit or other governmental consent; and (k) a suspension of delivery of Product Water pursuant to Section 8.5.

**17.3 Events Not Deemed Force Majeure.** It is specifically understood that, Section 17.2 notwithstanding, none of the following acts, events or conditions shall constitute a Force Majeure event: (a) strikes, lock outs, work stoppages or labor disputes of employees of Poseidon; (b) the failure of any subcontractor or supplier for any reason to furnish labor, materials, services (other than utility service) or equipment unless the failure results from a Force Majeure event affecting the subcontractor or supplier; (c) equipment failure (unless caused by a Force Majeure event); or (d) any denial of an application for or a delay in the review, issuance or renewal of, or the suspension, termination or interruption of, any permit or other governmental consent, if caused by Poseidon's failure to apply for or use commercially reasonable efforts to prosecute the application for such permit or governmental consent.

#### **17.4 Excused Performance.**

**17.4.1 Occurrence of Force Majeure Event.** Upon the occurrence of a Force Majeure event which affects a Party to this Agreement, such Party shall be excused from its obligations under the Agreement (except for payment obligations) for the period during which it is unable to comply with such obligations as a result of the Force Majeure event.

**17.4.2 Notification and Mitigation.** Any excuse of obligations of a Party under this Agreement pursuant to Section 17.4.1 is subject to the proviso that, upon obtaining knowledge of a Force Majeure event such Party: (a) promptly notifies the other Party of such Force Majeure event; (b) provides reasonable details relating to such Force Majeure event; and (c) implements mitigation measures to the extent commercially reasonable.

#### **18. RIGHT OF FIRST OFFER.**

**18.1 Restriction on Transfer.** Except as provided in Section 21.16, Poseidon shall not voluntarily or involuntarily, by operation of law or otherwise, give, sell, assign, transfer, donate, pledge, mortgage, hypothecate or encumber (any such disposition is hereinafter referred

to as "Transfer"), all or any portion of its interest in the Project (hereinafter a "Property Interest") without first complying with the provisions of Section 18.2 of this Agreement. Except as provided in Section 21.16, any purported Transfer of a Property Interest without compliance with the provisions of this Agreement shall be void and of no force or effect.

## **18.2 Right of First Offer.**

**18.2.1 Notice of Transfer.** If Poseidon desires to Transfer a Property Interest, Poseidon shall first give written notice (the "Request") to the District of Poseidon's desire to Transfer a Property Interest, requesting that the District provide Poseidon with an offer to purchase the Property Interest.

**18.2.2 District Offer.** The District shall be entitled, but not required, within ninety (90) days following delivery of the Request, to deliver a written offer (an "Offer") to Poseidon specifying the price and the other terms pursuant to which the District would be willing to purchase the Property Interest. Poseidon shall be entitled, but not obligated, to accept the Offer, within sixty (60) days after the delivery of the Offer (the "Acceptance Deadline") by sending a written acceptance of such Offer to the District ("Accepted Offer"). If Poseidon does not accept the Offer by the Acceptance Deadline, the Offer shall be deemed to have been rejected.

**18.2.3 Closing.** The closing of the Transfer of the Property Interest in accordance with an Accepted Offer shall be upon a mutually agreed date (but no later than ninety (90) days following the Acceptance Deadline). The District shall deliver the purchase price at the closing and at or prior to the closing the Parties shall execute and deliver such other documents as are reasonably necessary to consummate the Transfer of the Property Interest upon the terms set forth in the Accepted Offer.

**18.2.4 Subsequent Transfer.** If after an Offer has been rejected or deemed rejected Poseidon desires to sell the Property Interest, Poseidon may, at any time within one hundred eighty (180) days after the Acceptance Deadline, Transfer such Property Interest to any third party upon terms (i) no less favorable in the aggregate as those contained in the rejected Offer or (ii) less favorable in the aggregate as those contained in the rejected Offer, subject to the District having ninety (90) days to elect to acquire the Property Interest on such less favorable terms. If a sale of the Property Interest does not occur within one hundred eighty (180) days after an Offer has been rejected or deemed rejected, Poseidon shall not consummate such sale without again complying with the provisions of this Section 18.2.

**19. DISPUTE RESOLUTION.** The Parties shall establish prior to the Commercial Operation Date, or sooner in the event a dispute arises prior to such a date, a dispute coordination committee (the "Committee") consisting of two (2) management representatives each from Poseidon and the District and an independent representative (the "Independent Representative"). The Independent Representative shall be mutually acceptable to both Parties and shall be a person either with (i) experience in the construction and operation of facilities such as the Project or (ii) such other qualifications as are relevant with respect to a particular dispute. The Parties may change the Independent Representative upon mutual agreement. The Parties shall provide

written notice of appointment of their respective Committee representatives to the Independent Representative promptly following the date the Committee is established. If either Party's representatives change, such Party shall promptly notify the other Party and the Independent Representative of the change. The Committee shall meet as the circumstances may deem necessary to resolve any disputes under this Agreement. All disputes arising from this Agreement shall be submitted to the Committee for resolution as a condition precedent to seeking any other relief under this Agreement. The fees and expenses of the Independent Representative shall be shared equally by the Parties. If the procedures referenced in this Section do not result in resolution of the dispute within ten (10) business days after commencement of the Committee meeting: (a) the Parties, upon mutual agreement, may submit the dispute to binding or advisory arbitration for resolution in accordance with such procedures as are mutually agreed; or (b) either Party may commence legal action in a court of competent jurisdiction to enforce or interpret the terms of this Agreement.

## **20. INDEMNITY.**

**20.1 District's Indemnity.** The District shall save, indemnify, hold harmless and defend (with counsel reasonably acceptable to Poseidon), Poseidon, its successors, assigns and affiliates, and their respective officers, directors, controlling persons (if any), employees, attorneys, agents, consultants and shareholders (the "Poseidon Indemnitees") from, against and in respect of any and all claims (including third party claims), suits, actions, proceedings (formal and informal), investigations, judgments, deficiencies, damages, settlements and liabilities (collectively "Losses") as and when incurred by any of the Poseidon Indemnitees arising out of or based upon any breach or alleged breach of any express representation, warranty, covenant, or agreement of the District contained in this Agreement or in any document, instrument, or agreement executed and delivered by the Parties in connection herewith which specifically provides for the applicability of the indemnity provisions of this Agreement. The District shall not, however, be required to indemnify any of the Poseidon Indemnitees to the extent any Losses arise from or relate to the gross negligence or willful misconduct of any of the Poseidon Indemnitees.

**20.2 Poseidon's Indemnity.** Poseidon shall save, indemnify, hold harmless and defend (with counsel reasonably acceptable to the District), the District, its successors, assigns and affiliates, and their respective officers, directors, controlling persons (if any), staff members, employees, attorneys, agents and consultants (the "District Indemnitees") from, against and in respect of any and all Losses arising out of or based upon any breach or alleged breach of any express representation, warranty, covenant, or agreement of Poseidon contained in this Agreement or in any document, instrument, or agreement executed and delivered by the Parties in connection herewith which specifically provides for the applicability of the indemnity provisions of this Agreement. Poseidon shall not, however, be required to indemnify any of the District Indemnitees to the extent any Losses arise from or relate to the gross negligence or willful misconduct of any of the District Indemnitees.

**20.3 Indemnification Procedures.** Each Party's obligations with respect to this Section 20 are subject to the condition that the indemnified Party gives the indemnifying Party reasonably prompt notice of any Losses for which indemnification is sought hereunder. The

indemnified Party shall cooperate in the defense of such claim (and pending assumption of defense, an indemnified Party may take such steps to defend against such claim as, in such indemnified Party's good faith judgment, are appropriate to protect its interests). The indemnifying Party shall pay such indemnified Party's reasonable out-of-pocket expenses incurred in connection with such cooperation. The indemnifying Party shall keep the indemnified Party reasonably informed as to the status of the defense of such claim. After notice from the indemnifying Party to an indemnified Party of the assumption, and the defense of a claim, the indemnifying Party shall not be liable to such indemnified Party for any legal or other expenses subsequently incurred by such indemnified Party in connection with the defense thereof other than those expenses referred to above. The indemnifying Party at the indemnifying Party's own expense and through counsel chosen by the indemnifying Party (which counsel shall be reasonably acceptable to the indemnified Party), shall defend any claim; provided, however, that if, in the indemnified Party's and the indemnifying Party's reasonable judgment at any time, either a conflict of interest arises between such indemnifying Party and the indemnified Party or if there are defenses which are different from or in addition to those available to the indemnifying Party and/or the indemnified Party and the representation of both parties by the same counsel would be inappropriate, then such indemnified Party shall have the right to employ one law firm as counsel, together with a separate local law firm in each applicable jurisdiction (if necessary) ("Separate Counsel"), to represent such indemnified Party in any action or group of related actions (which firm or firms shall be reasonably acceptable to the indemnifying Party), and in that event: (a) the reasonable fees and expenses of such Separate Counsel shall be paid by the indemnifying Party (it being understood, however, that the indemnifying Party shall not be liable for the expenses of more than one Separate Counsel (excluding such local counsel referred to above) with respect to any claim (even if against multiple indemnified Parties)); and (b) the indemnifying Party shall have the right to conduct its own defense in respect of such claim. If the indemnifying Party does not defend against a claim, the indemnified Party may defend, compromise and settle such claim and shall be entitled to indemnification hereunder (to the extent permitted by this Agreement). Notwithstanding the foregoing, the indemnifying Party shall not, without the prior written consent of the indemnified Party (which consent shall not be unreasonably withheld, conditioned or delayed), settle or compromise any claim or consent to the entry of any judgment unless: (x) there is no finding or admission of any violation of law or any violation of the rights of any person and no effect on any other claims that may be made against the indemnified Party; and (y) the sole relief provided is monetary damages that are paid in full by indemnifying Party.

## **21. MISCELLANEOUS.**

**21.1 Further Actions.** At any time and from time to time after the date hereof, each Party agrees to take such actions and to execute and deliver such documents as the other Party may reasonably request to effectuate the purposes of this Agreement.

**21.2 Amendment.** Except as otherwise provided in this Agreement, neither this Agreement nor any provision hereof may be waived, modified, amended, discharged, or terminated except by an instrument in writing signed by the Party against which the enforcement

319

of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such writing.

**21.3 Entire Agreement.** This Agreement constitutes the entire understanding among the Parties with respect to the matters set forth herein, and supersedes all prior or contemporaneous understandings or agreements among the Parties with respect to the subject matter hereof, whether oral or written.

**21.4 Notices.** Any notice, approval, consent, waiver or other communication required or permitted to be given or to be served upon any Party in connection with this Agreement shall be in writing. Such notice shall be personally served, sent by facsimile, sent prepaid by registered or certified mail with return receipt requested, or sent by reputable overnight delivery service, such as Federal Express, and shall be deemed given: (a) if personally served, when delivered to the Party to whom such notice is addressed; (b) if given by facsimile, when sent, provided that the confirmation sheet from the sending fax machine confirms that the total number of pages were successfully transmitted; (c) if given by prepaid or certified mail with return receipt requested, on the date of execution of the return receipt; or (d) if sent by reputable overnight delivery service, such as Federal Express, when received. Such notices shall be addressed to the Party to whom such notice is to be given at the address specified below or as such Party shall otherwise direct in writing to the other Parties delivered or sent in accordance with this Section. The "copy to" notice to be given as set forth below is a courtesy copy only; a notice given to such person is not sufficient to effect giving a notice to the principal Party, and a failure to give such a courtesy copy of a notice does not constitute a failure to give notice to the principal Party.

If to District, to:

Carlsbad Municipal Water District  
5950 El Camino Real  
Carlsbad, CA 92008  
Attn: General Manager  
Fax No. (760) 431-1601

With a copy to:

City of Carlsbad  
1200 Carlsbad Village Drive  
Carlsbad, CA 92008  
Attn: City Attorney  
Fax No. (760) 434-8367

If to Poseidon, to:

Poseidon Resources (Channelside) LLC  
501 West Broadway, Suite 840  
San Diego, CA. 92101  
Attn: President  
Fax No. (619) 595-7892

**21.5 Controlling Law.** This Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the State of California, without giving effect to any choice-of-law or conflicts-of-laws rule or principle that would result in the application of any other laws.

**21.6 Headings.** Headings, titles and captions are for convenience only and shall not constitute a portion of this Agreement or be used for the interpretation thereof.

**21.7 Cumulative Rights; Waiver.** The rights created under this Agreement, or by law or equity, shall be cumulative and may be exercised at any time and from time to time. No failure by any Party to exercise, and no delay or omission on the part of any Party in exercising any rights, shall be construed or deemed to be a waiver thereof, nor shall any single or partial exercise by any Party preclude any other or future exercise thereof or the exercise of any other right. Any waiver of any provision or of any breach of any provision of this Agreement must be in writing, and any waiver by any Party of any breach of any provision of this Agreement shall not operate as or be construed to be a waiver of any other breach of that provision or of any breach of any other provision of this Agreement. The failure of any Party to insist upon strict adherence to any term of this Agreement on one or more occasions shall not be considered or construed or deemed a waiver of any provision or any breach of any provision of this Agreement or deprive that Party of the right thereafter to insist upon strict adherence to that term or provision or any other term or provision of this Agreement.

**21.8 Liberal Construction.** This Agreement constitutes a fully-negotiated agreement among commercially sophisticated Parties, each assisted by legal counsel, and the terms of this Agreement shall not be construed or interpreted for or against any Party hereto because that Party or its legal representative drafted or prepared such provision.

**21.9 Severability.** If any provision of this Agreement shall be ruled invalid, illegal or unenforceable, then the Parties shall: (a) promptly negotiate a substitute for such provision which shall, to the greatest extent legally permissible, therein effect the intent of the Parties in such invalid, illegal or unenforceable provision; and (b) negotiate such changes in, substitutions for or additions to the remaining provisions of this Agreement as may be necessary in addition to and in conjunction with clause (a) above to give effect to the intent of the Parties without the invalid, illegal or unenforceable provision. To the extent that the Parties are able to negotiate such changes, substitutions or additions as set forth in the preceding sentence, and the intent of the Parties with respect to the essential terms of the Agreement may be carried out without the invalid, illegal or unenforceable provision, then the balance of this Agreement shall not be affected, and this Agreement shall be construed and enforced as if such invalid, illegal or unenforceable provision did not exist.

**21.10 Good Faith and Fair Dealing.** The Parties hereto acknowledge and agree that the performances required by the provisions of this Agreement shall be undertaken in good faith, and with all Parties dealing fairly with one another.

**21.11 No Third Party Beneficiaries.** Subject to Section 20, this Agreement does not create, and shall not be construed to create, any rights enforceable by any person, partnership,



corporation, joint venture, limited liability company or other form of organization or association of any kind that is not a party to this Agreement.

**21.12 Execution in Counterparts; Facsimile Signatures.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature page of any counterpart may be detached therefrom without impairing the legal effect of the signature(s) thereon, provided such signature page is attached to any other counterpart identical thereto except for having an additional signature page executed by the other Party. Each Party agrees that the other Party may rely upon the facsimile signature of a Party on this Agreement as constituting a duly authorized, irrevocable, actual, current delivery of this Agreement as fully as if this Agreement contained the original ink signature of the Party supplying a facsimile signature.

**21.13 Time of the Essence.** Time is of the essence of each and every provision of this Agreement. Unless business days are expressly provided for, all references to "days" herein shall refer to consecutive calendar days. If any date or time period provided for in this Agreement is or ends on a Saturday, Sunday or federal, state or legal holiday, then such date shall automatically be extended to the next day which is not a Saturday, Sunday or federal, state or legal holiday.

**21.14 Authority.** Each Party shall deliver to the other Party copies of such resolutions, certificates or written assurances evidencing authorization to execute, deliver and perform this Agreement.

**21.15 Number, Gender.** Where a word or phrase is defined in this Agreement, its other grammatical forms have a corresponding meaning. As used herein, and as the circumstances require, the plural term shall include the singular, the singular shall include the plural, the neuter term shall include the masculine and feminine genders, the masculine term shall include the neuter and the feminine genders, and the feminine term shall include the neuter and the masculine genders.

**21.16 Assignment.**

**21.16.1 Assignment by Poseidon.** Except as otherwise specifically permitted by Section 18 and this Section 21.16, neither this Agreement nor any of the rights, interests, or obligations hereunder may be assigned by Poseidon without the District's prior written consent, which consent may be withheld in the District's sole discretion. Poseidon shall not assign its rights under this Agreement to any third party if such third party would not be obligated to comply with Applicable Laws with respect to its ownership and operation of the Project. Poseidon shall transfer its rights and obligations under this Agreement to any transferee of Poseidon's rights with respect to the Project.

**21.16.2 Financing Assignments.** Poseidon may, without the consent of the District make such assignments as are necessary to create security interests for the financing of any of its obligations under this Agreement with bona fide third party lenders in bona fide loan transactions. In the event of such an assignment by Poseidon the District shall furnish such

information, consents, certificates, opinions of counsel and other documentation or assistance related to this Agreement as is reasonable and customary and mutually agreed by the Parties. Such consents shall include an undertaking by Poseidon's lenders not to terminate this Agreement as long as the District continues to perform its obligations hereunder and to cooperate with the District in any exercise by the District of its rights under Section 14.2.2.

**21.16.3 Assignment by the District.** Neither this Agreement nor any of the rights, interests, or obligations hereunder may be assigned by the District without Poseidon's prior written consent, which consent may be withheld in Poseidon's sole discretion. As a condition to Poseidon's consent to such assignment, Poseidon shall have the right to negotiate changes to the terms of this Agreement with the District's assignee, including but not limited to changes to provisions addressing: (i) differences between the Base Price and the Avoided Water Cost, (ii) termination events, (iii) testing and responsibility for water distribution systems, (iv) the Delivery Point and the Appurtenant Facilities; (v) the conditions to the District's obligations to purchase Product Water and (vi) defaults and remedies.

**21.16.4 General.** Any assignment of this Agreement or any of the rights, interests, or obligations hereunder shall be of no force or effect until the proposed assignee agrees in writing to be bound by all of the terms and conditions of this Agreement and such signed writing is delivered to the non-assigning party.

**21.16.5 Inurement.** Subject to the foregoing restrictions, the provisions of this Agreement shall be binding upon and inure to the benefit of all affiliates, subsidiaries, assigns, and successors-in-interest of the Parties. Without limiting the generality of the foregoing, the voluntary or involuntary dissolution of Poseidon or any merger, reorganization or consolidation where Poseidon is not the surviving or resulting entity, or any transfer by Poseidon of all or substantially all of its assets shall be deemed to be an assignment within the meaning of this Section. In such event, provided the District consents to any such voluntary or involuntary dissolution, merger, reorganization, consolidation, or transfer of assets, the surviving or resulting district, authority, agency, corporation, partnership, joint venture, limited liability company, public entity or other form of organization or association to which such assets shall be transferred or which is carrying on the business of Poseidon shall be obligated to perform Poseidon's obligations hereunder.

**21.17 Relationship.** Poseidon is an independent contractor and the relationship between the Parties shall be limited to performance of this Agreement in accordance with its terms. Neither Party shall have any responsibility with respect to the services to be provided or contractual benefits assumed by the other Party. Nothing in this Agreement shall be deemed to constitute either Party a partner, agent or legal representative of the other Party. No liability or benefits, such as workers' compensation, pension rights or liabilities, other provisions or liabilities arising out of or related to a contract for hire or employer/employee relationship, shall arise or accrue to any Party's agent or employee as a result of this Agreement or its performance.

**21.18 Agreement Not a Discretionary Approval.** The execution of this Agreement and its performance prior to the date on which the Project has been approved under CEQA, (the "Approval Date") (if and when such date shall occur) shall not be deemed or construed to

constitute any discretionary approval of the Project or any part thereof that is required from the City, the District or the RDA. The District shall file a Notice of Exemption under CEQA for the execution of this Agreement prior to the Approval Date, and shall file a Notice of Determination under CEQA for the District as responsible agency under CEQA, if and when the Approval Date shall occur. Poseidon agrees to reimburse the District for any legal fees and costs incurred by or awarded against the District in connection with any third party claim or suit challenging the District's actions under CEQA with respect to the Project to the same extent Poseidon is obligated to reimburse the City for such amounts pursuant to that certain agreement between the City and Poseidon dated January 21, 2004.

**21.19 Financing of the Project.** Poseidon agrees that it will not incur indebtedness secured by the Project in excess of (i) with respect to the initial financing of the Project, the projected cost of the Project as of the date such indebtedness is incurred and (ii) with respect to any subsequent financing of the Project, the fair market value of the Project as of the date such indebtedness is incurred.

**21.20 Project and Site Devoted to Public Use.** This Agreement grants certain contractual rights to the District, including but not limited to the right to purchase Product Water from Poseidon, the right of first offer described in Section 18 of this Agreement, and the right to exercise the options described in Sections 2 and 14.2.2 of this Agreement. The Parties intend by the grant of these rights to devote the Project and Poseidon's interest in the Site to public use by the City and the District to the extent of the Contract Capacity, under the terms and conditions of this Agreement. The fact that the Project and the Site have been appropriated to public use by the City and the District to the extent provided herein shall not give the City or the District any additional rights not specifically set forth in this Agreement, but instead reflects the District's independent judgment that this Agreement and Poseidon's use of the Site is integral to the District's public purpose of providing water to District and City residents. The rights the District has established under this Agreement result in the Project, the Site and Poseidon's interest in the Site being "appropriated to public use by a local public entity [(the City and the District)]" for the purposes of California Code of Civil Procedure § 1240.660.

**21.21 Recordation of Agreement.** The Parties shall record this Agreement.

**21.22 Security.** As security for its obligations under this Agreement, including without limitation Sections 6.2, 7.1, 7.2.3, 8.2, 8.5, 9.7, 10.2, 12.2 and 20.2 hereof, prior to the Commercial Operation Date Poseidon shall obtain and maintain an irrevocable, standby letter of credit (or such other form of security reasonably acceptable to the District) in the amount of Two Million Five Hundred Thousand Dollars (\$2,500,000). If such security (the "Security") is provided in the form of a letter of credit (the "LOC"), such LOC shall: (a) be issued by a financial institution (i) having an investment grade long-term, unsecured senior debt rating from Standard & Poor's Corporation or Moody's Investors Service, Inc. or (ii) is otherwise reasonably acceptable to the District; (b) name the District as beneficiary; (c) have a minimum term of one (1) year; (d) automatically extend for not less than six (6) months unless the issuing financial institution provides at least thirty (30) days prior written notice of termination or non-renewal to the District; (e) provide for the District to make drawings thereon: (i) after

the occurrence of a Poseidon Event of Default, in the amount of any finally adjudicated amount payable to the District under this Agreement by Poseidon or (ii) in the full amount of the LOC in the event the issuing financial institution provides the notice of termination or non-renewal described in clause (d) above and (f) otherwise be in form and substance reasonably acceptable to the District. The District shall return the Security to Poseidon contemporaneously with any termination of this Agreement pursuant to Section 14.2.2. If Poseidon fails to obtain the Security as required by this Section 21.22, or if Poseidon fails to replenish the amount of such Security after a drawing thereon resulting from a Poseidon Event of Default, then the District, upon written notice to Poseidon, may suspend deliveries of Product Water.

[The balance of this page intentionally left blank]

IN WITNESS WHEREOF, this Agreement has been executed as of the date and year first above set forth.

"District"

Carlsbad Municipal Water District, a  
municipal water district

By: 

Its: President

"Poseidon"

Poseidon Resources (Channelside) LLC, a  
Delaware limited liability company

By: 

Its: PRESIDENT

Approved as to Form

By: 

RONALD R. BALL  
City Attorney

10/20/04

326

State of CALIFORNIA  
 County of SAN DIEGO }

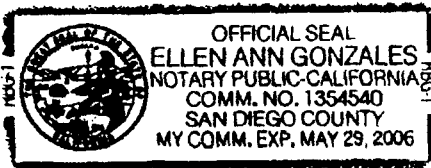
On OCTOBER 6, 2004 before me, ELLEN ANN GONZALES  
(DATE) (NAME, TITLE OF OFFICER - I.E., "JANE DOE, NOTARY PUBLIC")

personally appeared WALTER J. WILKOW  
(NAME(S) OF SIGNER(S))

☐ personally known to me - OR -

☒ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.



(SEAL)

*Ellen Ann Gonzales*

(SIGNATURE OF NOTARY)

RIGHT THUMBPRINT (OPTIONAL)

TOP OF THUMB HERE

**CAPACITY CLAIMED BY SIGNER(S)**

☐ INDIVIDUAL(S)  
☒ CORPORATE

OFFICER(S) PRESIDENT  
(TITLE(S))

☐ PARTNER(S)  
☐ ATTORNEY IN FACT  
☐ TRUSTEE(S)  
☐ GUARDIAN/CONSERVATOR  
☐ OTHER: \_\_\_\_\_

**SIGNER IS REPRESENTING:**  
(NAME OF PERSON(S) OR ENTITY(IES))

POSEIDON

**ATTENTION NOTARY:** The information requested below is **OPTIONAL**. It could, however, prevent fraudulent attachment of this certificate to any unauthorized document.

**THIS CERTIFICATE  
 MUST BE ATTACHED  
 TO THE DOCUMENT  
 DESCRIBED AT RIGHT:**

Title or Type of Document WATER PURCHASE AGREEMENT  
 Number of Pages 37 Date of Document 9/28/04  
 Signer(s) Other Than Named Above \_\_\_\_\_

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

No. 5907

State of CALIFORNIA

County of SAN DIEGO

On 10/25/04 before me, RANDEE HARLIB, Notary Public

DATE

NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC"

personally appeared CLAUDE A. LEWIS

NAME(S) OF SIGNER(S)

☒ personally known to me - OR - ☐ proved to me on the basis of satisfactory evidence to be the person ~~(X)~~ whose name ~~(X)~~ is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity ~~(ies)~~, and that by his/~~her/their~~ signature ~~(s)~~ on the instrument the person ~~(X)~~, or the entity upon behalf of which the person ~~(X)~~ acted, executed the instrument.



WITNESS my hand and official seal.

Randee Harlib  
SIGNATURE OF NOTARY

**OPTIONAL**

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

**CAPACITY CLAIMED BY SIGNER**

- ☐ INDIVIDUAL  
☐ CORPORATE OFFICER

TITLE(S)

- ☐ PARTNER(S) ☐ LIMITED  
☐ GENERAL  
☐ ATTORNEY-IN-FACT  
☐ TRUSTEE(S)  
☐ GUARDIAN/CONSERVATOR  
☐ OTHER: \_\_\_\_\_

**DESCRIPTION OF ATTACHED DOCUMENT**

WATER PURCHASE AG.

TITLE OR TYPE OF DOCUMENT

NUMBER OF PAGES

9/25/04

DATE OF DOCUMENT

**SIGNER IS REPRESENTING:**  
NAME OF PERSON(S) OR ENTITY(IES)

SIGNER(S) OTHER THAN NAMED ABOVE

**Schedule 3**  
**Purchase Price**

**1. Adjustments to Base Price**

**(a) Adjustment.** Commencing at the beginning of the first Water Year and thereafter at the end of each calendar quarter during the Term, the Base Price in effect for the upcoming calendar quarter (Base Price<sub>i</sub>) shall be adjusted as follows:

$$\text{Base Price}_i = \text{Base Price}_{\text{Initial}} \times ((70\% \times (\text{CPI}_i \div \text{CPI}_{\text{Initial}})) + (30\% \times (\text{EC}_i \div \text{EC}_{\text{Initial}})))$$

Where:

Base Price<sub>Initial</sub> = the Base Price as determined pursuant to Section 3.1.1 of the Agreement (excluding any adjustment pursuant to this Schedule 3)

CPI<sub>i</sub> = the most recently published value of the CPI as of the first day of calendar quarter<sub>i</sub>

CPI<sub>Initial</sub> = the most recently published value of the CPI as of the Effective Date

CPI = the Consumer Price Index, All Urban Consumers (CPI-U) (1982-84 = 100) for the San Diego MSA published by the Bureau of Labor Statistics of the United States Department of Labor

EC<sub>i</sub> = the average cost (weighted by the Project's use of electricity) of electricity used by the Project (expressed in \$/MWH) for the calendar quarter<sub>i-1</sub>, provided, however, that for the first adjustment of the Base Price pursuant to this Agreement, EC<sub>i</sub> shall be equal to EC<sub>Initial</sub> x (CPI<sub>i</sub>/CPI<sub>Initial</sub>)

EC<sub>Initial</sub> = \$60/MWH

Solely for illustrative purposes, a hypothetical example of the calculation of the Base Price as of the beginning of the third Water Year is set forth as Attachment A to this Schedule 3.

**(b) Change in Index.** If a substantial change is made in the manner in which the CPI is calculated, then the CPI will be adjusted to the figure that would have been used had the manner of computing the CPI in effect at the date of this Agreement not been altered. If the CPI (or a successor or substitute index) is not available, a reliable governmental or other nonpartisan publication evaluating the information used in determining the CPI will be used. No adjustments will be made due to any revision that may be made in the CPI for any month.

**(c) Statements.** Within thirty (30) days after the commencement of a Water Year, Poseidon shall prepare and provide to the District for its review a statement of any adjustment to the Base Price made pursuant to this Schedule 3.

**(d) No Decreases.** In no event shall the Base Price be reduced as a result of adjustments made pursuant to this Schedule 3.

329



## **2. Avoided Water Cost**

(a) **Components.** The Avoided Water Cost shall equal the sum of: (i) the SDCWA Price (defined in Paragraph 2(b) below), (ii) the Other Avoided Charges (defined in Paragraph 2(c) below) and (iii) the Subsidy and/or any other new or additional third party financial support for the District's purchase of Product Water which the District actually receives, either in cash or credit, for the applicable Water Year.

(b) **SDCWA Price.** As used herein, "SDCWA Price" shall mean: the sum of all of the amounts, whether now or hereafter imposed and however now or hereafter delineated, named or identified, and whether or not such amounts vary with the amount of water supplied (with any fixed amounts converted to an applicable per acre-foot amount), that the San Diego County Water Authority (the "Authority") charges or would charge the District to supply and transport water to the District; excluding, however all of the amounts, whether now or hereafter imposed and however now or hereafter delineated, named or identified, that the District is required to pay the Authority, after the Commercial Operation Date, to maintain the right to receive water from the Authority regardless of whether it purchases any water therefrom.

(c) **Other Avoided Charges.** As used herein, "Other Avoided Charges" shall mean: the sum of all of the amounts (without duplication of any components of the SDCWA Price), whether now or hereafter imposed or otherwise incurred and however now or hereafter delineated, named or identified, and whether or not such amounts vary with the amount of water supplied (with any fixed amounts converted to an applicable per acre-foot amount), that (i) any entity other than the Authority charges or would charge the District to supply and transport water to the District or (ii) are otherwise not incurred by the District from such other entity as a result of its purchase of Product Water hereunder; excluding, however (x) all of the amounts, whether now or hereafter imposed and however now or hereafter delineated, named or identified, that the District is required to pay to such other entity, after the Commercial Operation Date, to maintain the right to receive water from such other entity regardless of whether it purchases any water therefrom; and (y) all capital expenditures not incurred by the District as a result of its purchase of Product Water hereunder.

(d) **Adjustment of SDCWA Price.** If a change is made in the Authority's water rate structure or the methodology used by the Authority to determine its water rates (collectively, a "Rate Structure Change") which materially lowers the SDCWA Price, then the SDCWA Price will be subject to an appropriate adjustment so that the SDCWA Price as so adjusted will be substantially the same as the SDCWA Price had the Rate Structure Change not occurred. If the SDCWA ceases to exist, then the SDCWA Price shall thereafter be based on a rate of the then-largest agency, other than the State of California, delivering and selling water at wholesale to retail agencies in San Diego County, and the Parties shall negotiate in good faith to agree on such substitute rate, which shall reflect water cost information substantially equivalent to the SDCWA Price in effect just prior to SDCWA's cessation of existence.

## **3. Tracking Account.**

(a) **Additions to Tracking Account.** If during all or any portion of a Water Year the Base Price is greater than the Avoided Water Cost, then at the end of such Water Year an amount shall be added to a nominal tracking account (the "Tracking Account") based on the difference between the Base Price and such Avoided Water Cost, as follows:

(Base Price minus Avoided Water Cost) times (the number of acre-feet of Product Water sold to the District in such Water Year or during the portion of such Water Year that the Base Price exceeded the Avoided Water Cost, as applicable, including Product Water deemed to be sold pursuant to Section 9.8).

(b) **Deductions from Tracking Account.** If during all or any portion of a Water Year the Avoided Water Cost is greater than the Base Price and the balance of the Tracking Account is greater than zero (0), the following amount (the "Deferred Payment") (up to the total balance of the Tracking Account) shall be included in the invoice for the last month of such Water Year and shall be paid by the District to Poseidon:

(Avoided Water Cost minus Base Price) times (the number of acre-feet of Product Water sold to the District in such Water Year or during the portion of such Water Year that the Avoided Water Cost exceeded the Base Price, as applicable, including Product Water deemed to be sold pursuant to Section 9.8).

(c) **Other Tracking Account Provisions.** If at the expiration of the Term the balance of the Tracking Account is greater than zero (0), Poseidon's rights with respect to the Tracking Account shall terminate; provided however, that if the District has exercised its Purchase Option, the balance of the Tracking account shall be paid to Poseidon by the District in addition to the Purchase Option Price.

**4. Additional Payment.** If during all or any portion of a Water Year the Avoided Water Cost is greater than the Base Price and the balance of the Tracking Account is zero (0) (taking into account any deductions from the Tracking Account for such Water Year pursuant to Paragraph 3(b) above), a payment (the "Additional Payment") equal to fifty percent (50%) of the following amount shall be included in the invoice for the last month of such Water Year and shall be paid by the District to Poseidon:

((Avoided Water Cost minus Base Price) times (the number of acre-feet of Product Water sold to the District in such Water Year or during the portion of such Water Year that the Avoided Water Cost exceeded the Base Price, as applicable, including Product Water deemed to be sold pursuant to Section 9.8)) minus (any Deferred Payment for such Water Year).

331

## Attachment A

### Assumptions:

Cumulative adjustment through the beginning of the third Water Year of 7%.

Base Price <sub>Initial</sub>	=	\$861/acre-foot
CPI <sub>i</sub>	=	219.7
CPI <sub>Initial</sub>	=	205.3
EC <sub>i</sub>	=	\$64.20/MWH
EC <sub>Initial</sub>	=	\$60/MWH
Base Price <sub>i</sub>	=	$\$861/\text{acre-foot} \times ((70\% \times (219.7 \div 205.3)) + (30\% \times (\$64.20/\text{MWH} \div \$60/\text{MWH})))$
	=	\$921.36/acre-foot

330

## Schedule 8.2 - Quality Standards

Quality Parameter <sup>10</sup>	Analytical Method <sup>1</sup>	Sampling		Units	Concentration Limits	
		Sample period <sup>2</sup>	Sample Method		Central Tendency <sup>3</sup>	Extreme <sup>4</sup>
Total Dissolved Solids	2540 C	one year	Weekly grab	mg/L	350	400
Chloride	4110 B	one year	Weekly grab	mg/L	180	210
Bromide	4110 B	one year	Weekly grab	mg/L	0.5	0.8
Boron	3120 B	one year	Weekly grab	mg/L	tbd <sup>5</sup>	1 <sup>5</sup>
Turbidity	2130 B	one month	Continuous <sup>6</sup>	NTU	0.3	0.5
SDS-THM <sup>9</sup>	5710 C	one year	Monthly Grab: 100% Desal	mg/L	> 70% of MCL <sup>7</sup>	< 100% of MCL <sup>7</sup>
SDS-THM <sup>8,9</sup>	5710 D	one year	Monthly Grab: 50% desal & 50% Aqued	mg/L	> 70% of MCL <sup>7</sup>	< 100% of MCL <sup>7</sup>
SDS-HAA <sup>9</sup>	5710 D	one year	Monthly Grab: 100% Desal	mg/L	> 70% of MCL <sup>7</sup>	< 100% of MCL <sup>7</sup>
SDS-HAA <sup>8,9</sup>	5710 D	one year	Monthly Grab: 50% desal & 50% Aqued	mg/L	> 70% of MCL <sup>7</sup>	< 100% of MCL <sup>7</sup>
Temperature	2550	one month	daily grab	°F	-	85 °F

1. All methods taken from *Standard Methods On Line*, published by APHA, AWWA, and WEF.
2. Sample period - concentration limits are calculated for this period
3. Central Tendency - can be exceeded in no more than 50% of samples taken
4. Extreme - can be exceeded in no more than 10% of samples taken
5. Permanent values to be determined pursuant to Section 8.3.
6. Continuous analysis, values at 15 minute intervals used in all calculations
7. Use the MCL that applies in the District's Distribution system
8. Does not apply if the District is using exclusively Desalinated Water
9. After the first year of testing, frequency of testing shall be per Applicable Law.
10. All samples to assess compliance with Applicable Law and Schedule 8.2 (except for samples for SDS-THM and SDS-HAA analyses) are to be collected at mutually agreed upon location at the Project site. All SDS-TMM and SDS-HAA samples are to be collected at mutually agreed upon locations in the District's distribution system, as required by Applicable Law.

Examples of interpreting the central tendency and the extreme:

- a. TDS - Central tendency requirement: no more than 26 samples among any 52 contiguous weekly samples may exceed 350 mg/L.
- b. TDS - Extreme: no more than 5 samples among any 52 contiguous weekly samples may exceed 400 mg/L.
- c. Turbidity - central tendency requirement: no more than 1440 measurements among 2880 contiguous measurements recorded at 15 minute intervals may exceed 0.3 ntu.
- d. Turbidity - extreme requirement: no more than 288 measurements among 2880 contiguous measurements recorded at 15 minute intervals may exceed 0.5 ntu.
- e. SDS-THM - Central tendency requirement: no more than 6 samples among any 12 contiguous samples may exceed the MCL for THMs which is applicable to the water in the District's distribution system at the time the samples are taken.

## **Schedule 12**

### **Insurance**

1. A combination of general and excess liability insurance with a limit of no less than \$50,000,000.00 per occurrence).
2. Automobile liability insurance at least as broad as Insurance Services Office form number CA 0001 (Ed. 1/87) covering Automobile Liability Code 1 (any auto) with a limit of no less than \$5,000,000.00 per accident.
3. Workers' compensation insurance as required by the State of California and Employer's Liability Insurance with an employer's liability limit of \$1,000,000.00 per accident for bodily injury and disease.
4. Builder's risk insurance on an all risk basis with a limit of liability no less than the price of Poseidon's engineering, procurement and construction contract.
5. Property insurance equal to the replacement value of the Project.

Deductibles of \$100,000.00 or more or self-insured retentions must be declared to and approved by the District.

Exhibit 13.2.9

Development Agreement Term Sheet

**TERM SHEET FOR DEVELOPMENT AGREEMENT  
BETWEEN THE CITY OF CARLSBAD  
AND POSEIDON RESOURCES (CHANNELSIDE) LLC**

Project	Reverse-osmosis seawater desalination plant (the "Project"). The Project will be located at a site adjacent to the Encina Power Station in the City of Carlsbad (the "City").
Parties	The City of Carlsbad, the Carlsbad Municipal Water District (the "District"), the Carlsbad Housing and Redevelopment Commission (the "RDA") and Poseidon Resources (Channelside), LLC ("Poseidon").
Purpose of Term Sheet	This Term Sheet is intended to provide a basis for the negotiation of a comprehensive development agreement ("Agreement") and should not be construed as all-inclusive. Further, this Term Sheet represents the intentions of the parties as of the date it is executed. Poseidon recognizes that the Agreement is subject to public review and approval by the Carlsbad City Council and the California Coastal Commission (the "Coastal Commission"). Poseidon recognizes that the Agreement is subject to the California Environmental Quality Act.

**PRINCIPAL TERMS**

Vesting	The Agreement vests or "freezes in place" the General Plan, zoning, and PDP if they are approved concurrently for the Poseidon site. Any future permit or approval shall be governed solely by laws, ordinances and regulations of the City in effect at the time the Agreement is adopted.
Term	The term shall be 40 years from the date the Agreement is effective, which is when it is approved by the Coastal Commission, or the ordinance adopting the Agreement becomes effective, whichever is the later event.
Runs with the Leasehold	The Agreement shall be recorded and run with the leasehold interest, and its obligations shall bind any successors in interest who assume, use or occupy the Poseidon leasehold. Per Government Code Section 65868.5, the "burdens of the agreement shall be binding upon, and the benefits of the

agreement shall inure to, all successors in interest to the parties to the agreement."

**Payment of Taxes and Fee  
in Lieu of Taxes**

Poseidon and successors in interest shall pay a fee in lieu of taxes to the City equal to the property taxes that the City, the District and the RDA would receive from the construction and operation of a desalination facility on the Poseidon leasehold, such fee to be waived so long as the leaseholder pays property taxes due under state law for the use and occupancy of the leasehold, and does not claim a partial or full exemption from payment for such tax. Neither Poseidon nor its successors in interest shall contest the payment of (i) any property taxes validly imposed under applicable law or (ii) the fee in lieu of taxes described above.

**Exemption from Any  
Future Special Water  
Production Tax or  
Franchise Fee**

The City agrees that for the term of the Agreement, so long as the City is paid the taxes, or fee in lieu of taxes described in the preceding section, it will not levy in a discriminatory manner against Poseidon any tax or fee. For example, it will not attempt to collect from Poseidon a franchise fee, tax, or other monetary charge levied only on businesses which produce or sell water, and if such fee, tax or charge is adopted by the City, Poseidon and its successors shall be exempt.

**Modification or  
Termination Per Code,  
Provisions for Mandated  
Annual Review**

Per Government Code Section 65865.1, the City may terminate or modify the Agreement if it finds on the basis of substantial evidence that Poseidon or its successor in interest has not complied in good faith with its terms and conditions. Provisions for conduct of annual review required by Government Code Section 65865.1.

**Approval by Coastal  
Commission**

Per Government Code Section 65869, because the Project is located in an area which does not yet have an approved Local Coastal Program, the Coastal Commission must approve the Agreement. If the Environmental Impact Report is certified, the parties expect to apply for the approval of the Coastal Commission as soon as is practicable thereafter.

**Assignment**

The rights and obligations of the Agreement, upon written notice to the City, may be assigned and delegated by Poseidon in its discretion, in connection with a permitted assignment of the Water Purchase Agreement. If any entity acquires the leasehold by condemnation or involuntary sale, this Agreement and its rights and duties shall be assigned and delegated to the new acquiring entity and Poseidon shall have no further liability under the Agreement. Poseidon shall, at the request of the City, use reasonable efforts to have the City named as a party in any

337



proceeding with respect to such a condemnation or involuntary sale. To the extent that Poseidon receives any condemnation award attributable to the right of the City to receive a payment in lieu of taxes under this Agreement, Poseidon shall pay the amount of such award to the City.

**Financing of Public  
Improvements, Pipes and  
Rights of Way**

The City shall have no obligation to use public financing, such as an assessment district or Mello Roos district, for financing of public improvements, such as roads, pipes, etc. The City, the District and the RDA shall provide, and shall cause any governmental agency under their control to provide any required public rights of way for the facilities to deliver Product Water to the District from the Project without charge.

**Environmental Compliance**

Poseidon shall pay all costs associated with environmental review and regulatory agency permitting. The City and Poseidon recognize that time is of the essence and will take all reasonable steps to complete environmental review and enter into the Agreement in a timely manner.

**Unable to Reach  
Agreement**

In the event that the parties are unable to establish terms and adopt the ordinance approving the Agreement within 12 months, this Term Sheet shall expire unless it is extended by mutual written consent.

**Signatures**

The City and Poseidon represent that this Term Sheet is an expression of current intent to negotiate, draft, establish terms of and execute the Agreement or agreements to implement the principals established in this Term Sheet. This Term Sheet shall not be construed as a contract. Each party shall bear its own costs incurred in implementing this Term Sheet.

# Poseidon Resources Amended and Restated Water Purchase Agreement

Skip Hammann

Glenn Pruim

May 11, 2010

# Background

- Sept. 28, 2004 original agreement
- Provide 100 % CMWD potable water
- Anticipated details would follow
- Eight previous amendments

# Amendment Purpose

- Desirable to restate all revisions
- Acknowledges parties actions
- Both parties desired amendments
- Lenders requested revised language

# Guiding Principals

- Quality
  - Quantity
    - Reliability
      - Price
        - Economic Benefit
          - Risk

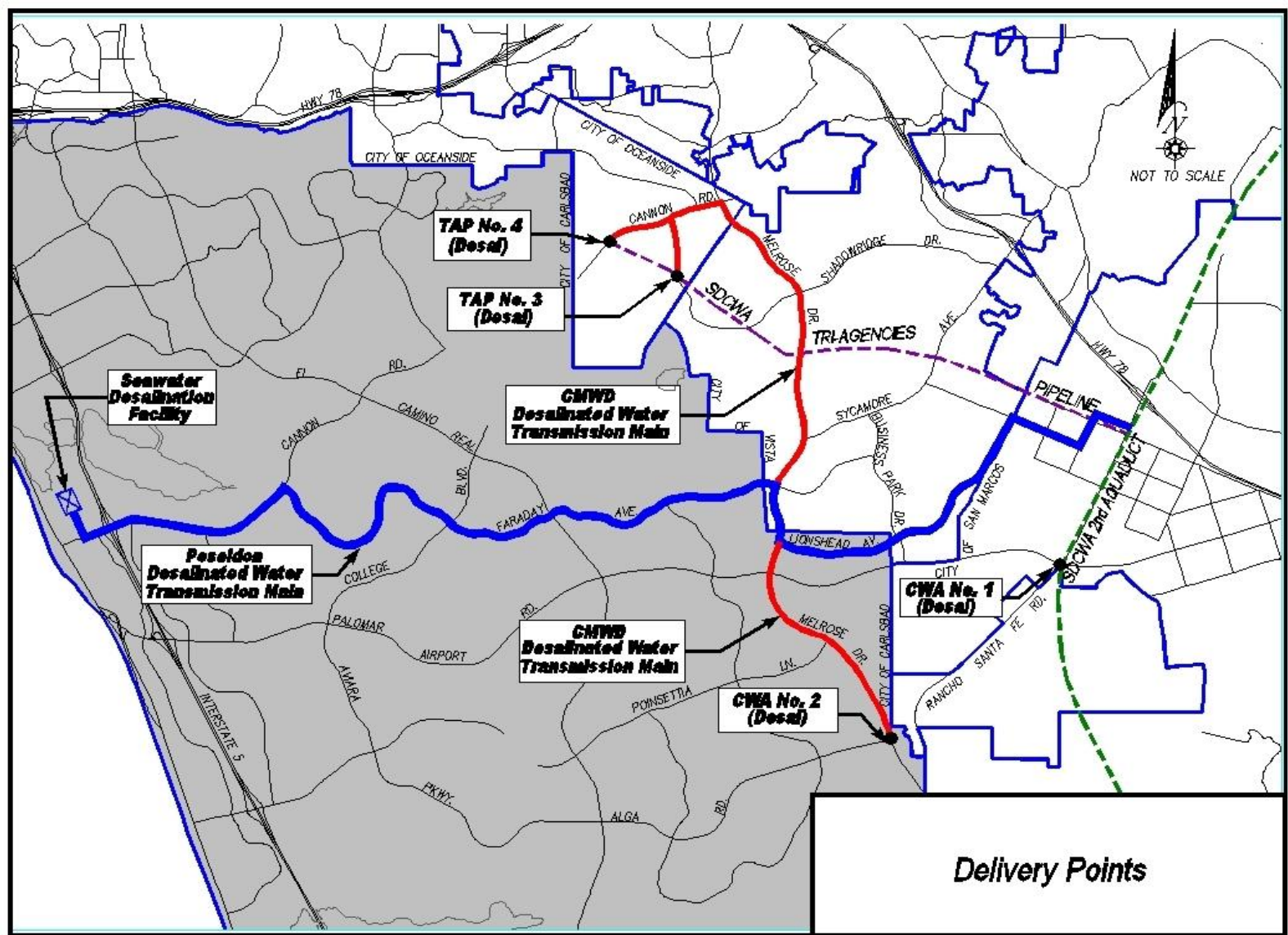
# Financial Risk

- Lenders language to minimize their risk
- MWD subsidy up to \$250 per acre foot
- SDCWA subsidy up to \$200 per acre-foot
- CMWD assume responsibility (action / inaction)

# Delivery Regime

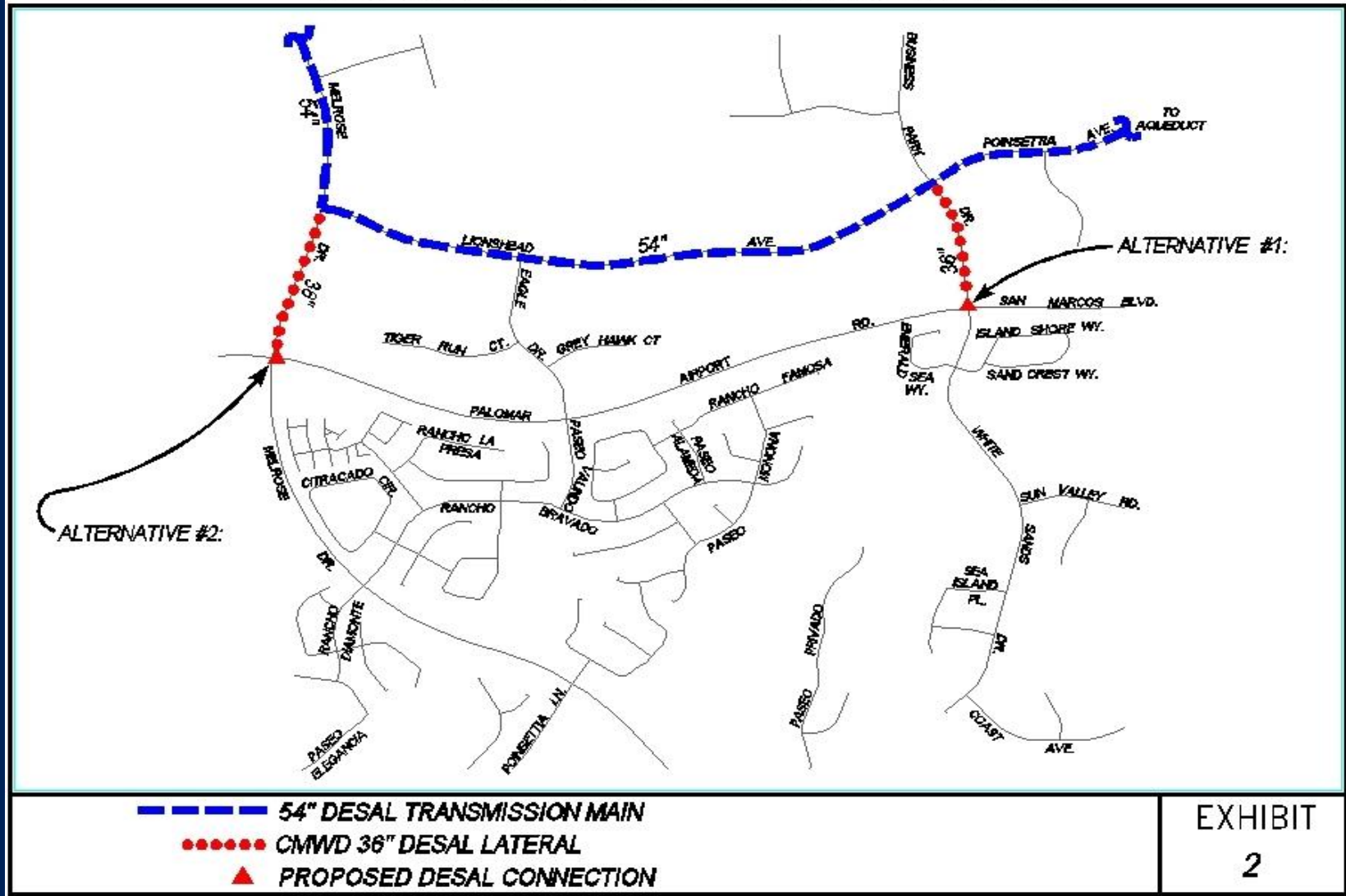
- August 18, 2009 - Resolution No. 1372
  - Poseidon deliver 80% CMWD demand
  - Direct delivery to CMWD
  - Poseidon to construct 4 delivery points
- Defer direct delivery facilities
  - Defer construction of 4 delivery points (5 yrs+)
  - Defer construction of PAR delivery point







## PROPOSED CMWD DESALINATED WATER CONNECTIONS



# Annual Water Demand

- Existing WPA
  - Maximum purchase to 28,000 acre feet
  - Minimum daily quantity - 10 MGD
  - Maximum daily quantity - 25 MGD
- Proposed WPA
  - Maximum purchase to 25,100 acre feet
  - Minimum purchase - 80% potable demand
  - Minimum daily demand to 8 MGD (30 days/yr.)

# “Step-in” Provisions

- Lender
  - Same rights as Poseidon
    - Breach
    - Default
  - Cure period
    - Limited to cure a breach or default

# Fiscal Impact

- CMWD will never pay Poseidon more than SDCWA for an equal volume of water
- No direct fiscal impact approving the recommended WPA
- Additional capital cost for construction deferred to a later date
- Risk of CMWD action or inaction (SDCWA and MWD subsidies)

# Recommendation

Adopt resolution approving the Amended  
and Restated Water Purchase Agreement

# QUESTIONS?